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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

Estate of SHELTON A. McHENRY,

Deceased.

EDWARD S. HALL, *et al.*,

Petitioners,

v.

THOMAS E. O'SULLIVAN, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

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QUESTIONS PRESENTED

In California, as in many states, a presumption of undue influence and constructive fraud arises when an attorney who has drafted a will is named as a major beneficiary. Because the exercise of undue influence by attorneys is deemed especially egregious, the presumption is a strong one and courts are directed to give cases where it arises "the closest scrutiny." Thus, not only does the attorney have the burden to overcome the presumption, but, the burden of proof is heavier than that which normally obtains in civil litigation: the attorney must offer "the clearest and most satisfactory evidence" that he did not unduly influence the client and that no advantage was taken by him, that he performed with "the most perfect good faith," and that the client was fully informed of all relevant matters and so was placed as to be able to act

understandingly and to deal with the attorney at arm's length.

Relatives and friends of a decedent whose will left a substantial portion of his estate to the attorney who prepared it obviously have a strong interest in trying to prove the attorney's overreaching, and should have all the leeway that the Constitution allows and requires under its guarantee of procedural Due Process to do so. The questions for this Court involve, first, whether Due Process is satisfied where, as here, contestants are prohibited from showing through circumstantial evidence that, as a result of his conflict in interest, the attorney abrogated his professional responsibilities to the decedent and took unfair advantage of him.

The second question concerns the standard for appellate review of a finding that the attorney has overcome the

presumption of undue influence. Specifically, to protect the public by truly enforcing Due Process, we urge the Court to decide whether the "substantial evidence" standard employed by the California Court was adequate to protect against misapplication of both the standard of "clearest and most satisfactory evidence" and the requirement that the attorney's conduct be subjected to "closest scrutiny," or whether an augmented standard of review is warranted under the Due Process clause and to protect the integrity of the bar.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were: Contestants Edward S. Hall and William Dean Mills; Respondents Thomas E. O'Sullivan and John T. Lynch.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

No. A-259

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EDWARD S. HALL et al.,
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v.

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

OPINIONS BELOW

The decision of the Court of Appeal affirming the trial court's finding that there was no undue influence is not officially reported; the opinion is reprinted in Appendix A hereto ("App. A") at 1a-35a. The prior opinion of the Court of Appeal remanding for a hearing and

counseling the strictest of scrutiny is reprinted App. B, 36a-58a. The order granting in part and denying in part rehearing is at App. C, 59a-60a. The Order of the California Supreme Court denying review is at App. D, 61-a.

JURISDICTION

The unpublished decision and Order of the California Court of Appeal affirming the judgment was entered on May 19, 1994 (App. A. 1a-35a). A motion for rehearing was denied on June 14, 1994 (App. C, 59a). A timely Petition to the California Supreme Court for Review was denied on July 27, 1994 (App. D, 61a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. By Order of Justice Sandra Day O'Connor (App. E, 62a), the time to file a petition for Certiorari was extended to November 24, 1994. Because that is Thanksgiving day, the

Petition is due November 25, 1994.

CONSTITUTIONAL PROVISION

The fourteenth amendment to the United States Constitution provides in pertinent part:

> . . . [N]or shall any State deprive any person of life, liberty, or property without due process of law . . .

STATEMENT OF THE CASE

Petitioners, Edward S. Hall and William Dean Mills are relatives of Shelton A. McHenry, a wealthy Southern California restaurateur who died in 1987. Hall and Mills contested the probate of McHenry's 1984 will and 1985 codicil in which one half of the substantial residue of his multi-million dollar estate was left to the attorney who drafted the will, respondent Thomas O'Sullivan, and the other half to McHenry's former business manager, John Lynch.

The petition for revocation of probate charged, inter alia, fraud and undue influence by O'Sullivan and Lynch in procuring the residuary clause. Though the petition was initially denied based on its being filed one day late, the California Court of Appeal (Unpublished Opinion, Nov. 20, 1991 (App. B, 36a)) pointed to evidence of extrinsic fraud by O'Sullivan in persuading the legatees not to timely contest the will. Mindful that courts must be "particularly vigilant where the alleged impropriety is by an attorney" (54a), the appellate court reversed and remanded so that the probate court could exercise its equitable jurisdiction in further proceedings.

Noting undisputed facts that should have alerted the probate court to investigate further (that "counsel for decedent drafted the will and placed

himself as co-executor; called employees from his office to witness the will although decedent's employees were available; and became the beneficiary of half the substantial residue of decedent's estate"), and the special responsibility of the courts to protect against unprincipled attorneys, the Court of Appeals wrote that the need to protect against fraud is so great that a court should sua sponte raise any issue of fraud and afford the closest of scrutiny. As the Court put it (a.54 (emphasis added)):

> Where the alleged undue influence is by the attorney who drafted the will and takes a substantial sum of the estate, "such bequest invites invocation of the evidentiary presumption of undue influence ..." (Estate of Lind (1989) 209 Cal. App. 3d 1424, 1430) In such instances, even if the contestant cannot prove standing, when "it is plain" that the attorney "drafted the will in which he is named as executor and as a major beneficiary, the probate court

> may upon its own motion raise the presumption of undue influence and require [the attorney] to rebut the presumption. [Citations omitted] In such cases of possible abuse of the confidential relationship by attorneys, the probate court should raise the presumption sua sponte. Such exercise of undue influence by attorneys are especially egregious and thus require the closest scrutiny. [Citations omitted]"

When the matter returned to the trial court, that court perceived that the procedural posture of the case as well as contestants' pleadings and concessions in this and other related actions significantly circumscribed its mission. It reasoned that the sole issue for its determination was whether the 1984 residuary clause and 1985 codicil were procured by undue influence or fraud on the part of O'Sullivan or Lynch. Since the attorney's drafting of the will and taking of a substantial bequest had raised

a presumption of undue influence -- and the burden was, therefore, on the attorney to rebut the presumption -- the trial began with O'Sullivan's evidence.

However, as shown below, though O'Sullivan's necessarily self-serving testimony should have been viewed with healthy skepticism, the judge gave the attorney unusual deference: O'Sullivan was permitted to present the bulk of his "testimony" as to the "facts" of his confidential interactions with Mr. and Mrs. McHenry over a course of years in the form of a 31-page declaration; then, over objection, he was allowed to give his "opinion" as to the "patterns" those "facts" reflected.

Even though drastically changed circumstances (the death of his wife of 55 years, his recent remarriage and contemplated annulment, the sale of some

of his businesses, his suffering of a stroke, heart attack and degenerative eye disease, his dependence on round the clock care) put the continuation of any such "patterns" in question and demanded careful counseling and advice by any ethical and prudent counsel asked to prepare a will in 1984 (and, in particular, one who stood to inherit nearly half of the estate), these earlier "patterns" were ultimately adopted wholesale by the court and relied upon by it to find both that counsel O'Sullivan had acted in good faith and that McHenry was fully informed when he executed his will in 1984, when, in fact, O'Sullivan not only failed to discuss his conflict of interest at that time, but, according to his own testimony, sat idly by and gave no professional advice whatsoever.

Though the policy reason for creating

an especially strong presumption of undue influence in cases of this sort emanates from the concern that the attorney's interest in being a beneficiary might impair his independent and untrammeled judgment and advice, the court refused to find that either the attorney's confessed passivity or the poor quality of the advice he rendered was the least bit relevant in determining whether the presumption of undue influence had been rebutted. As the court kept repeating, "This isn't a malpractice action."

Similarly, even though the one-on-one interactions with the decedent reported by the attorney were, by definition, incapable of direct contradiction, the court refused to find relevance in conduct by both McHenry and O'Sullivan circumstantially contradicting O'Sullivan's version of events and which

suggested over-reaching on his part or circumstantially indicated his consciousness of impropriety. In the court's view, if the conduct did not directly show fraud or affirmative persuasion by O'Sullivan in 1984 or his confession or admission to such behavior, it too was irrelevant.

The Evidence: In live testimony and a 31-page declaration, O'Sullivan proffered that he had been McHenry's attorney for over 30 years. A tax and estate planning specialist, he joined the law firm of Todd Johnson in 1955; Johnson had been doing McHenry's legal work since 1938 or 1939. After 1955, O'Sullivan and his office continued doing all of McHenry's legal work until McHenry's death in 1987.

Sullivan began estate planning for McHenry and his first wife, Bernice, in 1960. During the period O'Sullivan worked

for them, the McHenrys had prepared "in the neighborhood" of 12 wills or codicils. Until Bernice passed away, the McHenrys wrote reciprocal wills in which each spouse left his or her estate to the surviving spouse. The McHenrys had no children and, when Bernice died in 1983, introduced and O'Sullivan offered his opinion (over objection) as to the "pattern" of testamentary philosophy that they reflected.

According to Sullivan, the McHenrys' wills reflected a "very consistent" pattern of leaving cash bequests to relatives, personal property to friends, and the residue to current "employees and professionals." When a person left the McHenrys' employ, the "general practice was to take them out of the will." O'Sullivan insisted that he played no part in assisting the McHenry's to form that

philosophy. (And he certainly did nothing to dissuade him from it.)

In a number of wills O'Sullivan had prepared for the McHenrys before Todd Johnson's death in 1971, this attorney had been named as a beneficiary of 5% of the residue. Sometime after he began doing the McHenrys' estate work, O'Sullivan was named a contingent beneficiary of Johnson's share. Thereafter, he became a non-contingent residuary beneficiary and his interest increased. O'Sullivan did not recall whether this was done on the instruction of Mr. or Mrs. McHenry.

(O'Sullivan's trial testimony was inconsistent with the documentary evidence he introduced. According to his trial testimony, he had been a contingent beneficiary with a potential 5% interest in the residue some time in the 1960's and was first named a non-contingent

beneficiary in 1971; his interest was increased from 5% to 10% at that time. However, trial exhibits showed he became a non-contingent legatee under the will of March 1, 1965, and had a 5% interest in the residue; his percentage share stayed the same in a 1967 will, and then increased to 14% in 1969; it fluctuated between 15% and 16.5% in wills of 1971, 1972, 1975 and 1976. Then, it jumped to 50% in 1981 where it stayed in 1984. 1981 was not only the first time that his share increased dramatically, it was also the first time that the McHenrys' wills did not contain the express condition that, to enjoy the bequest, the legatee had to have been in the McHenrys' employ at the time of their death.

Though he was certain he did not suggest to the McHenrys that they make a bequest to him (or to anyone else) or that

they change the amount of the bequest, O'Sullivan was exceedingly vague about what he did tell them -- and when he told them. Importantly, he did not advise, insist, urge, or even suggest to the McHenrys that they seek outside counsel, and there was no evidence that he advised them as to the possible effect of being a beneficiary on the exercise of his professional judgment; he simply asked them at some unspecified time or times if they wanted other counsel and relied on statements of Todd Johnson that they did not. Moreover, by the time his share in the residuary dramatically increased to 50% in 1981, he had apparently already discontinued any discussion whatsoever about his potential conflict.

Thus, in his declaration, O'Sullivan asserted:

> When I saw that McHenry

intended to make Johnson a contingent co-residuary legatee of 10 percent of the residue of his estate, I asked Johnson whether or not we should have McHenry's will prepared by another attorney.

Johnson informed me that he had previously discussed this matter with McHenry and that McHenry did not want any other law firm doing his legal work, particularly his will, which he considered quite personal.

* * *

I had conversations to the same effect with McHenry and Bernice, in which we discussed the issue of potential conflicts of interest.

I believe, but do not specifically recall, that I had such a conversation with them in connection with the 1960 will, in which I was not a beneficiary.

I am sure that I had such conversations again in connection with later wills, in which I was a named beneficiary.

Based on my discussions with Johnson and the McHenrys . . . , I proceeded with the preparation of the McHenry's 1960 will.

> McHenrys had very strong opinions as to how their estate was to be divided and as to who they wanted to prepare their wills.
>
> After a number of years of preparing different iterations of the McHenrys' wills and the McHenrys' continued expression of strong feelings about the distribution of their estate, the issue of conflict of interest was no longer addressed.

O'Sullivan explained that, "generally," when a new will or codicil was to be prepared, he received written instructions from Mr. and/or Mrs. McHenry. The "bulk" of the instructions were given by Mrs. McHenry, "with some additions by Mr. McHenry." Again, over objection, O'Sullivan was permitted to offer his opinion that, in comparison with other clients, the McHenrys were the "most detailed, meticulous, intense people in giving instructions."

O'Sullivan, whose relationship with

the McHenrys was strictly professional (he never socialized with them), insisted that he never made any suggestions about any of the changes in the will, but passively accepted whatever changes he was given. Notwithstanding any prior *pattern*, as for the 1984 will in issue, O'Sullivan's passive conduct was especially suspicious and disturbing given the many changed circumstances in Shelton McHenry's life and McHenry's expressions to others.

As noted, McHenry's wife of 55 years, Bernice, died in 1983. Shortly thereafter, McHenry married Ruth Tullis. Soon after that, he began to suffer a series of serious medical problems. He had a stroke and a heart attack in the spring of 1984 and suffered from a degenerative eye disease that gravely impaired his vision. He was hospitalized in May, 1984, and, when he was released in

mid-May, had round the clock nurses and depended on the help of a chauffeur to move around. At the same time, he was actively involved in selling off his restaurant and real estate interests.

The will at issue was executed on May 23, 1984, soon after McHenry's release from the hospital. O'Sullivan could not recall if he had spoken to McHenry while he was in the hospital, but claimed that he had visited him at home shortly before the execution of the will.

At that time, according to O'Sullivan, McHenry provided him with a copy of his 1981 will and instructed him as to changes, the most significant of which was a $500,000 gift to his new wife Ruth. O'Sullivan claimed he wrote these changes on the 1981 copy -- though, suspiciously, at this critical time O'Sullivan could not locate the copy or

any other notes indicating changes.

The death of McHenry's first wife and his remarriage, as well as the sale of certain restaurants, obviously suggested an array of never-before considered estate and tax planning issues. O'Sullivan, however, maintained that he did not render any advice or, indeed, ask McHenry a single question about his 1984 estate plan: he simply passively recorded the changes supposedly given by McHenry. He did not suggest that McHenry consult another lawyer or even bring up the topic of his potential conflict.

O'Sullivan prepared the will within a few days of their meeting and then returned to McHenry's home for its execution. In private once again, he supposedly went over the will with McHenry who made one change, and then -- though McHenry's nurse and chauffeur were at home

-- called his office for two employees to come to McHenry's home to witness the signing. According to O'Sullivan, McHenry was very private and "always" expressed his preference for having O'Sullivan personally handle his legal matters. As far as he knew, he and McHenry were the only people who knew the contents of McHenry's 1984 will.

In essence, then, it was O'Sullivan's position that (1) McHenry had an immutable estate plan in which trusted employees and professionals were to receive the residue; (2) not only was McHenry meticulous in detail, but he was not interested in any advice or counseling, or, indeed, subject to any influence from his attorney; (3) McHenry trusted and confided in O'Sullivan alone to do his legal work; and, (4) when he revised his will in 1984, called upon O'Sullivan simply to act as scrivener.

Contestants Hall and Mills attempted a two-fold attack on this position. First, they argued that, even if O'Sullivan's portrayal were accepted, this was insufficient to overcome the presumption of undue influence and invalidity of the residuary clause: O'Sullivan's conflict of interest resulted in the complete suspension of any independent professional judgment on behalf of McHenry and there was no showing that in 1984 (or ever) McHenry was fully aware of this possible effect on O'Sullivan's performance.

The contestants also proffered refuting evidence to show that McHenry was not as "consistent" or resolute in his estate plans, no longer meticulous in detail, or as independent of or trusting in counsel as portrayed by O'Sullivan, and, therefore, that he depended on

O'Sullivan for undivided professional advice and judgment.

They also proffered evidence to show that O'Sullivan subverted McHenry's wishes by putting things in the will that McHenry did not and, since he was blind, could not see, and that O'Sullivan subsequently acted in a way that strongly suggested he was aware that he took advantage of his professional relationship to remain a 50% beneficiary under the 1984 will -- that he subsequently acted in a way that showed, if you will, a consciousness of impropriety. The court, however, did not accept the relevance of this evidence.

Thus, contestants presented evidence that days before the execution of the 1984 will, McHenry had told his clergyman that he planned to annul his marriage to Ruth Tullis and intended to leave his chauffeur Terry Gillard $300,000. (Gillard, a

trusted employee was left only a specific bequest of $10,000 in the 1984 will and no share in the residue.) McHenry's stated plan to "take care of" Gillard was confirmed by several other witnesses.

Also, at the same time that, according to O'Sullivan, McHenry was instructing him about the 1984 will, McHenry's nurse and chauffeur overheard McHenry tell O'Sullivan that he wanted to get back the jewelry he had given to Ruth. These and other witnesses also testified that around the same time, McHenry had expressed his distaste for and reservations about O'Sullivan.

And, contrary to McHenry's prior "patterns" of attention to detail and revision of his will when significant changes in his family and employment relationships occurred, McHenry -- according to O'Sullivan -- now did not

change his will in contemplation of his marriage to Ruth, and filed for divorce from her just two weeks after the execution of the 1984 will in which she was named as a major beneficiary.

(O'Sullivan's reported conduct in connection with the 1984 will -- his supposed failure to ask any questions or render any advice -- becomes even more questionable in light of this closely ensuing divorce action. O'Sullivan tried to justify his failure to ask questions of McHenry relating to his second marriage by claiming that he did not learn of McHenry's intent to file for divorce until after the will had been executed. McHenry's minister contradicted this, however, by testifying that, at McHenry's direction, he had telephoned O'Sullivan from McHenry's hospital room weeks before the will was prepared and heard McHenry

tell the attorney of his desire to annul his marriage.

Additionally, as for McHenry's purported custom to have only O'Sullivan handle McHenry's legal affairs, not only did O'Sullivan claim that he did not personally work on the divorce papers, but McHenry executed a 1985 codicil to his will and revoked the $500,000 bequest to Ruth without O'Sullivan's assistance; this, according to O'Sullivan, the only testamentary document prepared by McHenry without his assistance during the entire 30-year-period he worked for McHenry.)

Lastly, contestants proffered evidence that, after McHenry's death, O'Sullivan had "wined and dined" McHenry's cousin, Beatrice Moorman, to keep her from contesting the will and then offered her some crystal if she would sign a paper against her own attorney. The court

refused to consider this evidence or any evidence at all about O'Sullivan's conduct after McHenry's death in 1987. As far as the court was concerned, the only kind of evidence it would consider probative to counter the attorney's self-serving evidence was "an admission" or "confession" by O'Sullivan that he had defrauded McHenry.

Contestants argued to the California Court of Appeal, in essence, that the standard of proof required in connection with an inquiry into undue influence, where those who would take under a will but for an attorney's being made a beneficiary -- an inquiry important enough that courts must raise it sua sponte -- cannot be deemed satisfied by the type of proof allowed in this case, and that the Court erred in disallowing evidence broadly showing overreaching. As

Contestants put it(Opening Brief to Court of Appeal, p.25):

> The courts' sua sponte duty to inquire into such wills will be eviscerated if an attorney can protect his bequest by testifying that he merely passively accepted it and did not actually suggest that the testator give him something, and by producing witnesses to testify that they saw no fraud or undue influence performed in front of them. O'Sullivan should be held to the requirement of producing ⁑the clearest and most satisfactory⁑ evidence to rebut the presumption [of undue influence].

When the California Court of Appeal affirmed on this sorry record, petitioners sought rehearing and argued that the disallowance of evidence to rebut the presumption of undue influence, and the type of evidence accepted as rebutting the presumption in the first place, constituted a denial of Due Process (Petition for Rehearing p.3).

The Court of Appeal upheld the trial court's determination that O'Sullivan had rebutted the presumption of undue influence because, it said repeatedly, there was "substantial evidence" before the Court.

Contestants argued to the California Supreme Court that the evidence was not "substantial", that evidence of the nature accepted by the court could not have satisfied the heavy burden an attorney properly carries to rebut the presumption of undue influence, that the trial court had unfairly cut off their right to present evidence and had improperly refused to consider circumstantial evidence, and that they were "entitled to procedural due process, in that they were entitled to a fair hearing, as mandated by the Constitution" but were not afforded such process (Petition for Review p.23).

REASONS FOR GRANTING THE WRIT

This Court Should Grant The Writ To Assure Public Confidence In The Bar And To Protect The Due Process Rights Of Those Challenging Over-Reaching By Attorneys

This Court has recognized in cases as varied as Young v. U.S. ex rel Vuitton et Fils S.A., 481 U.S. 787 (1987), and Cuyler v. Sullivan, 446 U.S. 355 (1980), that any time an attorney has a conflict of interest, there is a significant possibility that his or her professional judgment will be compromised. Where the conflict arises from being the beneficiary of a will that the attorney prepared, State courts are particularly concerned.

The need for a lawyer of independence and undivided loyalty to the testator has been continually emphasized. Indeed, a conflict on the part of an attorney in a testimonial situation is considered so fraught with the danger of compromised

judgment and a high potential for undue influence that a presumption of improper influence has been widely recognized. In re Estate of Witt, 198 Cal. 407 (1926); Haynes v. First Natl. State Bank of New Jersey, 87 N.J. 163 (1981); Park v. George, 282 Ark. 155 (1984); Dial v. Walker, 328 Ill. 56 (1927); Donovan v. Bromley, 113 Mich. 53 (1897); St. Leger's Appeal, 34 Conn. 434 (1867); Barkley v. Barkley Cemetery Assoc., 153 Mo. 300 (1899); In re Guidi's Will, 259 App. Div. 652, aff'd. 284 N.Y. 680 (1940); In re Estate of Reid, 138 So.2d 342 (1962 Fla. App.); In re Lobb's Will, 177 Or. 162 (1945); In re Swan's Estate, 4 Utah 277 (1956); In re Spenner's Estate, 167 Wis. 2d 645 (1962).

Rebutting the presumption generally entails more than simply showing that the testator was of firm mind and resolve and

that the testamentary disposition represented his or her actual intent. Rather, it requires a showing that, in essence, there has been a knowing and voluntary waiver of the attorney's conflict of interest by the client: there must be a showing of a candid and full disclosure by the attorney so that the client can intelligently determine whether to continue to rely on the services of the attorney or seek independent counsel. See, e.g., In re Estate of Witt, 198 Cal. 407, 409 (1926); In re Blake's Will, 21 N.J. 50, 58-59 (1956).

This notion -- that a client must be apprised of the various risks and pitfalls and only then can decide to hazard those dangers -- is deeply embedded in the Code of Professional Responsibility. According to Canon 5, Ethical Consideration 5-5 of the Model Code of Professional

Responsibility:

> A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts such a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or over-reached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficiary be prepared by another lawyer selected by the client.

In this case, the trial court improperly deemed the attorney's self-serving evidence as to the testator's resolve and intent sufficient to overcome the presumption of undue influence, and, once the presumption was lifted, apparently regarded as relevant only direct evidence that McHenry was actively

dominated by O'Sullivan. It thus prohibited contestants from showing through circumstantial evidence that, as a result of his conflict in interest, the attorney abrogated his professional responsibilities to the decedent and, in that way, took unfair advantage of him.

At every turn, the court took a misguided view of what was relevant. It deemed it irrelevant that the attorney suspended all professional counsel, that he asked no questions and gave no advice (because "this isn't a malpractice action), and that O'Sullivan subsequently acted in a way that suggested he was aware that he had taken advantage of his professional relationship to remain a 50% beneficiary under the 1984 will. Indeed, the court even found evidence of forgery on the will irrelevant.

While any one of these evidentiary

rulings alone might not have resulted in the denial of Due Process, in the aggregate they worked to deprive contestants of the opportunity to show impropriety and over-reaching.

The strong presumption of undue influence, the heavy burden of proof, the requirement that the court closely scrutinize the dealings between a testator and an attorney who benefits from the testator's will all serve the public policy in favor of the security of those who entrust themselves or their property to the administration of others. Estate of Gelonese, 36 Cal. App. 3d 854, 862 (1974). By failing to give the attorney's conduct the "closest scrutiny," by finding that the presumption of undue influence had been overcome without the "clearest and most satisfactory" evidence that the testator had been fully apprised of the

attorney's conflict of interest and intelligently chose to continue with that attorney's representation notwithstanding the potential deleterious effect of the conflict on the attorney's judgment, the court thus also did a great disservice to the public and to the Bar.

Yet, when the appellate court reviewed the trial court's determination (see App. A), it applied a standard of review ("substantial evidence") (17a, 21a, 22a) that failed to safeguard against misapplication of both the standard of "clearest and most satisfactory evidence" and the requirement that the attorney's conduct be subjected to "closest scrutiny." If a trial court's finding that the presumption of undue influence was rebutted may not be disturbed on appeal if there is "any substantial evidence to support it" (17a, 21-22a), if

all conflicts in the evidence must be resolved in favor of the respondents, and all legitimate and reasonable inferences must be indulged to uphold the judgment if possible, there is no assurance that the trial court fulfilled its obligation to give the matter "the closest scrutiny."

An augmented standard of review is, therefore, warranted under the Due Process clause and to protect the integrity of the bar -- and because the matter is of such importance to all the States, and the citizens who must be protected from unscrupulous attorneys in the whole country, this Court ought to enunciate a standard that meets Due Process concerns. See Jackson v. Virginia, 443 U.S. 307 (1979) (Due process requires some consideration of the standard to be used in assessing the sufficiency of the evidence; when standard of proof is beyond

a reasonable doubt, standard is not whether "any evidence" supports verdict, but, rather whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt). See also Honda Motor Co., Ltd. v. Oberg, ___ U.S. ___, ___ n.10, 114 S.Ct. 2331 (1994), in which this Court noted that the standard of proof it discussed as insufficient as a matter of Due Process in Jackson v. Virginia, 443 U.S. at 324, is the ▪rough equivalent▪ of a verdict that is ▪against the great weight of the evidence▪.

The decision in this case is clearly against the great weight of evidence. Under Honda, then, the decision cannot pass Constitutional muster, and a standard ought to be enunciated by this Court, which should instruct State courts that the "substantial evidence" standard does

not in this context satisfy Due Process concerns.

Here, since warnings to and waivers from the client are the essential guarantees that the client has not been unduly influenced by a conflicted attorney, the evidence ought to support a finding of these facts. At the very least, then, the standard of review should be whether the evidence could reasonably support a clear and convincing finding that the attorney apprised the client of the conflict and urged the client to secure disinterested advice, and that the client determined to nevertheless have the attorney prepare the will.

This Court has not hesitated to find proceedings violative of Due Process where a party has been deprived of a well-established common law protection against inaccurate adjudication. See, e.g., Honda

Motor Co., Ltd. v. O'Berg, supra, 114 S.Ct. 2331 (1994) (Oregon's absence of judicial review of punitive damage award deemed violative of Due Process; judicial review is necessary safeguard against arbitrary deprivation of property). Here, the failure of the trial court to appreciate what must be shown by an attorney seeking to overcome the presumption of undue influence, and the failure of the appellate courts to rigorously review the trial court's actions, deprived contestants -- and the public -- not only of their common law protection against an inaccurate adjudication, but also crucial judicial protection against unethical and unprincipled attorneys. This Court should grant the petition to assure public confidence in the Bar and to protect the Due Process rights of those challenging

over-reaching by attorneys.

CONCLUSION

This Court should grant the writ and reverse the judgment.

A summary vacatur of the decision of the California Supreme Court with a direction to consider the matter under the heightened standard of review required by Due Process, would be appropriate.

November 24, 1994

Respectfully submitted,

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No. B 074070

(Super.Ct.No. P 718653)

IN THE
COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

Estate of SHELTON A. McHENRY,
Deceased.

EDWARD S. HALL, et al.,
Contestants-Appellants

v.

THOMAS E. O'SULLIVAN, et al.,
Petitioners-Respondents.

May 19, 1994

Introduction

In the context of a will contest, the appellants, Edward S. Hall and William Dean Mills, seek to invalidate the residuary clause of the will of the testator, Shelton A. McHenry, which leaves the residue of the testator's multi-million dollar estate one-half to respondent, Thomas O'Sullivan, the attorney who drafted the will, and one-half to respondent, John Lynch, the testator's former business manager.[1]

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[1]This is the fifth appeal to reach us in this probate matter. In one prior appeal, summary judgments granted by the probate court in favor of respondents were reversed by this division of the Court of Appeal on November 20, 1991. (Consolidated Nos. B042160/ B044490.) In another, this court affirmed an order of the superior court dismissing for lack of jurisdiction a civil action for the tort of destroying evidence brought by 10 plaintiffs, including respondents. (No. B059042.) This court also affirmed an order of the superior court denying the motion of Debra McDaniel, another heir-at-law, to set aside the order admitting to probate McHenry's will and codicil. (B041531.) Most recently, we affirmed the judgment of the superior court granting summary judgment in favor of respondents on a petition to probate a destroyed will. (No. B 067397.) In the destroyed will action, McHenry's cousin, Beatrice Moorman, joined by Hall and Mills and several other cousins, initially claimed that a valid will executed sometime after April 20, 1985, had been destroyed. Later the petitioners changed their position and charged valid execution of the May 1984 will, and alteration or substitution of pages to make respondents the residuary legatees. The superior court found that Moorman could not prove the existence of the alleged portions of the will that did not include respondents as beneficiaries.

Appellants contend: (1) that respondents failed to present evidence sufficient to rebut the presumption of undue influence; (2) that the trial court's decision was based on errors of law; (3) that the revocation clause of the testator's will should be enforced and the residue of his estate should pass by intestacy; (4) that it was reversible error to deny evidence that the will of May 23, 1984, was not executed in the manner prescribed by law; (5) that the trial court erred by allowing introduction into evidence of purported copies of certain prior wills of the testator which O'Sullivan allegedly drafted; (6) that the will was not properly executed and witnessed, considering that the testator was blind; (7) that a divorce, not a will, was being discussed on May 23, 1984; (8) that a new trial should be granted and sanctions in the amount of $3,000 should be reversed due to insufficiency of the evidence and irregularity of the proceedings; and (9) that the order awarding sanctions against Jeffers and appellants in favor of Lynch in the sum of $107,000 should be reversed. We affirm the judgment.

The Evidence

Shelton McHenry was a well-known Southern California restauranteur. He acquired the Tail o' the Cock Restaurant on La Cienega Boulevard in Los Angeles in 1938. Later he acquired three other restaurants, the Bantam Cock, the Valley Tail O' the Cock, and the Colonial House Restaurant in Oxnard.

McHenry died on August 24, 1987 in Los Angeles, California. He was predeceased by his first wife, Bernice

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Respondent John Lynch died in August 1993. On December 27, 1993, Elizabeth Lynch, executrix of the estate of John Lynch, was substituted in this appeal as proponent and respondent.

McHenry, who died of cancer on August 10, 1983, and had divorced his second wife, Ruth Tullis, prior to his death. He had no children by either of his two spouses, and no brothers or sisters.

McHenry's will dated May 23, 1984, and a codicil dated April 20, 1985, were admitted to probate on August 24, 1987. The will and codicil left a number of cash bequests to friends, employees and surviving relatives. A substantial portion of McHenry's estate was disposed of by a residuary clause leaving one-half shares to each of the respondents.

The codicil of April 20, 1985, declared that McHenry was divorced from his former wife, Ruth (Tullis) McHenry and was making no provision for her. The codicil also deleted as a beneficiary McHenry's mother, Mattie Lemon, who died sometime after execution of the May 23, 1984 will. It contained a standard clause confirming in all other respects the will of May 23, 1984.

The instant litigation began when appellant Hall, a cousin of McHenry, brought a petition for revocation of probate of the testator's will and codicil. He was joined by Mills upon the filing of a second amended petition for revocation of probate, which sought revocation of the entire codicil, and revocation of the will only as to the bequests to respondents.

In May 1988, Hall filed a verified petition for partial distribution by an heir, seeking a distribution from the estate of the specific cash bequests mentioned in the will.[2] The

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[2]Hall was left a $5,000 cash bequest under the contested will. Prior to 1984, Hall was not a beneficiary under any of McHenry's many previous wills. Mills has never been named as a beneficiary in any of McHenry's wills, including the May

petition characterized the pending will contest as limited to the residuary clause and any specific bequests to respondents. O'Sullivan objected to the distributions under the "no contest" provision in McHenry's will, but the objections were overruled and Hall and others were permitted to take the amounts provided for in the 1984 will.

The instant will contest continued to run its course. In April 1989, the superior court granted summary judgment against appellants. Among other findings, the superior court ruled: that Mills was not a proper contestant in the action because he failed to file a timely will contest, and failed to obtain leave to file a complaint in intervention; and that Hall was estopped to assert the invalidity of the entire will because he had validated the will by both taking and petitioning for all other legatees and devisees to take under it.

In an unpublished opinion, this court reversed the summary judgment and sent the matter back to the lower court for further proceedings. We held that despite having elected to take under the will, Hall could contest the gift of the residue. We further held that, despite the late filing of the will contest by Hall, because of the special circumstances involving alleged undue influence and fraud on the part of O'Sullivan, an attorney, the trial court was bound to examine, sua sponte, the circumstances under which the gifts of residue and specific bequests were made to O'Sullivan and Lynch. Other findings of the superior court were left undisturbed.

Thereafter, a court trial of the will contest was held on the limited issues of fraud and undue influence relating to the residuary clause, and the alleged conspiracy between respondents, John Lynch and Thomas O'Sullivan. In light of the legal presumption of undue influence against O'Sullivan, as

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1984 will.

the attorney who drafted the 1984 will and 1985 codicil, the trial court required O'Sullivan to proceed first with his evidence.

Since 1955, Thomas O'Sullivan has been a tax and estate planning attorney.[3] He was hired by Attorney Todd Johnson, in 1955, to work in Johnson's law office. Shelton McHenry and his wife, Bernice, were among O'Sullivan's first clients.[4] From 1955 until the death of McHenry in 1987, regardless of what law firm O'Sullivan became affiliated with, he devoted a substantial percentage of his time to the McHenrys' legal work. The McHenrys' were private about their legal affairs and made it clear to O'Sullivan that they did not want their legal work done by others.

O'Sullivan began doing estate planning work for the McHenrys in about 1960, while still in Johnson's employ. Through the years, the McHenrys executed about a dozen wills and codicils drafted by O'Sullivan. Their estate plans consistently followed a pattern established prior to the time O'Sullivan became their lawyer. Until Bernice passed away in 1983, Bernice and Shelton McHenry generally wrote reciprocal wills, wherein each spouse left his or her estate to the surviving spouse. In the event the spouse predeceased the testator, the will left specific bequests of cash and property to particular relatives, and the restaurant businesses and residue of their estates to key employees and professionals. Once an

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[3]A substantial portion of O'Sullivan's testimony was proffered in the form of a 31-page declaration.

[4]Johnson was the owner of the Los Angeles restaurant, Somerset House. Before becoming McHenry's lawyer, he helped McHenry acquire the Tail O' the Cock restaurant in 1938.

employee left the McHenrys' employment, they routinely eliminated that person from their wills.

Over the years, the McHenrys made frequent changes in their wills, changing the amounts and percentages various beneficiaries would receive of the estate if the testator had no surviving spouse. Detailed instructions for modification were often given to O'Sullivan in writing, followed up by conferences and follow-up telephone calls.

According to O'Sullivan, it was not the McHenrys' normal practice to leave the residue of their estate to relatives. One exception was McHenry's mother, Mattie Lemon, who was left a percentage of the residue for a period of time before her death.

One of the McHenrys' earliest wills left 10 percent of the residue of the surviving spouse's estate to their attorney, Todd Johnson. O'Sullivan first appeared as a beneficiary of 5 percent of the residue in the 1965 will. On written instructions from Bernice McHenry, O'Sullivan was also made a contingent beneficiary of Johnson's share if Johnson predeceased McHenry, but only if he was still working for Johnson's office at the time of McHenry's death. O'Sullivan's percentage share of the residue was increased to 14 percent in McHenry's 1969 will. In subsequent wills and codicils, O'Sullivan's share was first increased to 16.5 percent, then decreased to 15 percent, then increased to 50 percent in the August 1981 will.[5] The 50 percent residuary gift was carried over into the May 1984 will.

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[5]Under the 1981 will, O'Sullivan was also to receive the Colonial House Restaurant and property. Under the 1984 will, the gift of the Colonial House Restaurant was deleted and O'Sullivan was given a one-half interest in the Valley Tail O' the Cock Restaurant.

O'Sullivan never suggested to the McHenrys that they make him a bequest, or increase the amount of any bequest. O'Sullivan also never discussed the McHenrys' estate plan with John Lynch.

When O'Sullivan first became aware that McHenry wanted to make Johnson a legatee of a share of the residue of his estate, O'Sullivan asked Johnson whether McHenry's will should be prepared by another attorney. Johnson informed O'Sullivan that he had previously discussed the matter with McHenry, and that McHenry did not want any other law firm doing his legal work. O'Sullivan had similar discussions with the McHenrys, and personally warned them of the potential legal challenges that might result from leaving the bulk of their estate to persons other than their relatives. O'Sullivan is certain he had such a conversation in connection with some of the earlier wills in which he was left a share of the residue. Except to that extent, O'Sullivan never questioned the McHenrys about the identities of, or the character of, bequests made to relatives. The McHenrys had very strong opinions about how they wanted their estate divided, and did not want anyone else doing their legal work. After a number of years, the conflict of interest issue was no longer brought up with them.

Over the years, O'Sullivan also became involved in the McHenrys' business affairs. For every year from 1955 until the restaurants closed down, O'Sullivan prepared the income tax returns for the business. He also handled audits of the Internal Revenue Service and Franchise Tax Board, sought deferrals of jury service for restaurant employees, handled the legal aspects of any sale of property, and represented the business before the labor board.

A short time prior to May 23, 1984, after McHenry's discharge from the hospital following a stroke, O'Sullivan had

a meeting with McHenry about changing the will he had executed in 1981. McHenry gave O'Sullivan specific instructions as to its content, and O'Sullivan made notes of the requested changes on a copy of the 1981 will. At the time of trial, O'Sullivan no longer had those notes.

At the time of the May 1984 will, McHenry had recently married his second wife, Tullis. Among other changes from the 1981 will, the 1984 will added a gift to Tullis in the sum of $500,000. The 1984 will also deleted certain gifts of personal items which McHenry had disposed of following the death of his first wife. O'Sullivan was the only person present with McHenry when the proposed changes were discussed.

The will was executed on May 23, 1984, in McHenry's apartment. At the time of trial, O'Sullivan could no longer recall who was in McHenry's apartment on May 23, 1984, when the will was signed. O'Sullivan read to McHenry the dispositive paragraphs of the will, and McHenry said, "fine." McHenry, who was wearing glasses, glanced at parts of the will and certain handwritten changes were made at McHenry's request. Afterward, O'Sullivan called his office for two witnesses. When the witnesses arrived, McHenry signed and initialed the will in their presence.

Dr. James R. Blake is a physician. He met the McHenrys in the late 1970's, when Mrs. McHenry was referred for medical care. Later, he became the treating physician for Mr. McHenry after he suffered a heart attack in January 1984, followed by a stroke in March 1984. According to Dr. Blake, the stroke did not have any adverse impact on McHenry's ability to think, and he was functioning well from a mental standpoint in July 1984.

It is undisputed that McHenry suffered from impaired vision. Dr. Gary Asano saw McHenry in December 1984 on

referral from the Jules Stein Eye Institute. At that time, McHenry could read seven point type using a pair of high-powered reading glasses with a magnification 50 percent higher than McHenry's own reading glasses. Seven point type is smaller than a typical typewritten page, which is normally eight or ten point type. McHenry's degree of macular degeneration and visual acuity were probably about the same in May 1984.

Reverend Clifton King was McHenry's clergyman for 18 years. He conducted the funeral service for Bernice McHenry, when she passed away. He also performed the marriage ceremony of McHenry and his second wife, Tullis.

In May 1984, while in the hospital following his stroke, McHenry discussed with King his plans to divorce Tullis. During this hospital visit, McHenry gave King the telephone number of his attorney, O'Sullivan, and asked King to dial his number. King heard McHenry ask O'Sullivan to come and see him because he wanted to annul his marriage.

During a conversation in May 1994, McHenry told King of his intention to leave his personal assistant and chauffeur, Terry Gillard, a $300,000 bequest. McHenry queried whether the sum should be placed in a trust.[6]

John Lynch was 66 years of age and retired at the time of his trial testimony. For 15½ years prior to his retirement, he was the general manager for McHenry's restaurant properties and other holdings. At the time Lynch took over as general manager for McHenry, all four of the restaurants were losing money and were on the market for sale. The restaurants

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[6]Several other witnesses for appellants described statements in which McHenry expressed his intention to leave Terry Gillard a substantial bequest.

continued to lose money during their last years of operation. By the time Lynch quit working for McHenry, all of the restaurants had been sold.

Lynch had a deferred compensation arrangement with McHenry which provided that, if he worked from July 1, 1977, through his 65th birthday, in 1991, he would receive $200,000. Lynch did not work until 1991 because McHenry sold or closed the last of his restaurant properties in 1986. Lynch received a settlement of his deferred compensation in the sum of $200,000, paid in three annual installments.

Following the sale of one of the restaurants in 1980, the McHenrys told Lynch they intended to leave one of the restaurants to him in one of their wills. According to Lynch, shortly after McHenry's funeral, he learned for the first time from O'Sullivan that he was a 50 percent residual beneficiary of McHenry's will.

When his wife Bernice's health was deteriorating, McHenry asked Lynch to take over the handling of his mother's affairs. Lynch did so for several years until McHenry's mother passed away.

Lynch testified that despite McHenry's vision problems, he remained actively involved in the buying and selling of his own stocks until sometime in 1986. McHenry also stayed active in management decisions and never appeared confused, or unable to make a decision. As late as January 1987, McHenry was able to see sufficiently to sign checks and legal documents.

Lynch denied witnessing the signing of any of McHenry's wills. He was a participant in the residuary clauses of McHenry's wills in 1972, 1975, 1976 and 1981, but denied knowing that he was a beneficiary in any of the wills until after McHenry's funeral.

Lynch was a 35 percent residual beneficiary under a 1972 codicil, a 55 percent residual beneficiary under a 1975 codicil and a 1976 will, and a 50 percent residual beneficiary under McHenry's 1981 and 1984 wills. The 1981 will also left Lynch the entire Valley Tail O' the Cock Restaurant. In the 1984 will, the gift was decreased to a one-half interest in the restaurant.

Lynch wound up McHenry's business affairs shortly before the end of February 1987. He retired on February 28, 1987. Lynch did not see McHenry again after he retired and started traveling.

David Freeman was formerly and employee of O'Sullivan's law firm of Rutter, O'Sullivan, Greene and Hobbs. On May 23, 1984, he was advised that he was needed to witness a will for McHenry at his apartment. Freeman recalled that McHenry was fairly thin, and had white or gray hair and was walking around the room. According to Freeman, no one read the will to McHenry in Freeman's presence and it did not appear to him that McHenry was blind.

Julie Jean Holtz, another of O'Sullivan's employees, was also a witness to the signing of the May 23, 1984 will. Holtz recalled that the whole process took about 15 minutes and the will was not read aloud to McHenry.

Joseph Rossi is a physical therapist at St. John's Hospital in Santa Monica. He gave physical therapy to McHenry from April 1984 until the end of May 1986, on a daily basis. On May 23, 1984, McHenry was still suffering from paralysis and could not have walked around a room without the help of a walker and two assistants. McHenry was a big man, not a thin man, in May 1984.

On April 20, 1985, Rossi was present in McHenry's apartment to give him physical therapy. Rossi was a witness

to the signing of the codicil to McHenry's will but has no recollection of it. He would have recalled if someone tried to influence McHenry to sign something in his presence.

Gladys DuBois is one of the nurses who worked for McHenry following his stroke, which occurred on March 14, 1984. According to DuBois, McHenry could not see well enough to feed himself or read. DuBois was required to feed McHenry, and to read written materials to him.

One day, while McHenry was still hospitalized, McHenry declined to entertain a visit from O'Sullivan and told DuBois that O'Sullivan was just his lawyer. Shortly after his release from the hospital, McHenry told Dubois that O'Sullivan was just an employee, not a friend. He mentioned that O'Sullivan was preparing a will for him and expressed hope that O'Sullivan was honest.

DuBois also discussed Lynch with McHenry. According to DuBois, McHenry stated that he had promised Lynch $1 million in his lifetime to stay and be his business manager. He also expressed the opinion that the reason his business was decreasing was because of the poor quality of the food under Lynch's management.

Beatrice Cunningham Moorman is McHenry's first cousin. She received a cash bequest of $10,000 under the May 1984 will.

McHenry lived with Moorman's parents, Grace and Claude Cunningham, when he first came to California during the Depression. According to Moorman, McHenry was very close to the Cunninghams and for years sent them $300 every month. He sent the money to Moorman's mother after her father passed away.

Before McHenry married Tullis in February 1984, Moorman had lunch with McHenry at one of his restaurants,

to discuss his will. McHenry told Moorman not to worry, that her mother would be taken care of. McHenry also stated that his assistant, Terry Gillard, would be "taken care of for the rest of his life".[7]

While Moorman was dining with McHenry, Lynch came to the table repeatedly to advise McHenry that O'Sullivan was waiting for him. McHenry finally got angry and said, "Damn it, O'Sullivan works for me. I don't work for him."

Moorman discussed the will with McHenry a number of times during a six-month period. McHenry always mentioned Gillard and promised to take care of him. Up until two months before he died, McHenry said that Gillard would be taken care of for the rest of his life, and so would Moorman's mother; McHenry indicated that the balance of his estate would go to "a handful of relatives."

After McHenry died, Lynch contacted Moorman 18 to 25 times and tried to persuade her not to contest the will. Moorman never met Tullis; was not invited to the McHenry-Tullis wedding. McHenry had never visited her in her home.

Terry Gillard testified that he was employed by McHenry from the fall of 1979 through July 1987. On May 23, 1984, Gillard was working at McHenry's apartment when McHenry received a visit from O'Sullivan, O'Sullivan's female secretary and Lynch.[8] Gillard wheeled McHenry into the dining room to see his guests and retired to the kitchen, where he could hear McHenry and the others joking about Tullis.

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[7]Gillard received only a $10,000 cash bequest under the May 1984 will.

[8]For the first time at trial, appellants attempted to prove that Lynch was present at the May 23, 1984 will signing.

According to Gillard, within two to three weeks after McHenry had his stroke, Tullis was out dating other people. McHenry did not like it. On May 23, 1984, McHenry was completely preoccupied with his marital situation. McHenry filed for divorce in June 1984.

Sometime during the summer of 1984, Gillard reminded McHenry of his promise to provide for him if he continued working for him, and inquired about what that meant. McHenry told Gillard not to worry, that he had been taken care of.

According to Gillard, McHenry was furious with Lynch at the time he finished paying off the $200,000 in deferred compensation benefits in January 1987.

Rita Huddleston is one of the two nurses who cared for McHenry following his 1984 stroke. McHenry returned home from the hospital after his stroke on May 14 or 15, 1984. On May 23, 1984, Huddleston recalls that O'Sullivan came to the apartment at about 2 p.m. in the afternoon.[9] John Lynch was already present. O'Sullivan was accompanied by a young woman identified as his secretary.

On this occasion, McHenry confided to Huddleston that O'Sullivan was a "slob" upon seeing O'Sullivan arrive with his collar unbuttoned and his tie pulled down and his suit jacket slung over his shoulder. Asked by Huddleston why he

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[9]Huddleston described the day as unpleasantly hot, more like a day in September or October. The Los Angeles Times for May 24, 1984 indicates that on May 23, 1984, the high temperature at the civic Center was 78 degrees. At the Los Angeles International Airport, the high temperature was 70 degrees. In Santa Monica, near Westwood where McHenry lived, the high temperature was 70 degrees.

continued to employ O'Sullivan, McHenry replied that he did not like to make changes.

Huddleston heard McHenry, Lynch and O'Sullivan discussing divorce, and whether McHenry could get certain items of jewelry back from Tullis. She did not hear the rest of their conversation. No one else came to the apartment that day.[10]

John Lynch denied having any recollection of being in McHenry's apartment on the May 23, 1984, when the will was signed. He admitted being in and out of McHenry's apartment once or twice per week over a four-year period. He does not recall either being in McHenry's apartment with O'Sullivan and his secretary, or being there while McHenry's divorce or annulment was discussed. He did not discuss McHenry's will with O'Sullivan until after McHenry's will and codicil were admitted to probate.

According to O'Sullivan, McHenry did ask about getting items of jewelry back from Tullis, but not until after May 23, 1984.

At the conclusion of the trial, the court found that O'Sullivan had rebutted the presumption of fraud, undue influence and mistake, not only by clear and convincing evidence, but by the standard of beyond a reasonable doubt. The court found no evidence whatever of fraud or undue influence by respondents, or of a conspiracy between them.

Discussion

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[10]At her deposition, Huddleston testified that the visit from O'Sullivan and Lynch occurred on May 24, 1984. She assumes Gillard must have been absent from the apartment at the time. Otherwise, McHenry would not have asked her to open the door for his visitors.

I

Many of appellants' contentions amount to attacks on the sufficiency of evidence to support the judgment. We address them together, albeit not necessarily in the order advanced.

Appellants specifically argue that O'Sullivan failed as a matter of law to rebut the presumption of undue influence since he did not encourage the testator and his wife to seek advice from independent counsel, did not discourage the proposed bequest, did not remind them of the natural objects of their bounty, and failed to give them appropriate tax and estate planning advice.

In making their arguments, appellants give lip service to the substantial evidence standard. Yet those portions of the record purportedly establishing fraud and undue influence are summarized in vivid detail, to the exclusion of much of the evidence favoring respondents.

The standard of review on appeal is well settled. "The question whether the evidence adduced by a party who has the burden of proof carries the required weight is for the trier of fact and not the court of review." (*Estate of Gelonese* (1974) 36 Cal.App.3d 854, 863.) This means that the trial court's finding that the presumption of undue influence was rebutted may not be disturbed on appeal if there is any substantial evidence to support it. (*Id.* at pp. 966-867; *Estate of Clegg* (1978) 87 Cal.App.3d 594, 600.) All conflicts in the evidence must be resolved in favor of the respondents, and all legitimate and reasonable inferences must be indulged to uphold the judgment if possible. (Ibid.)

With respect to the purported lack of any advice to seek independent counsel, appellants discount the relevant facts. The subject of a conflict of interest was broached with

McHenry when he first made his lawyer, Johnson, a beneficiary under his will. The subject was raised again by O'Sullivan in connection with some of McHenry's earlier wills which made O'Sullivan a beneficiary. Undue influence is not established as a matter of law merely because long before the 1981 and 1984 wills were drafted, O'Sullivan ceased suggesting that McHenry might wish to have independent counsel draft his wills.

The evidence shows that McHenry was a sophisticated businessman and restauranteur with an acute sense of privacy in personal matters. He frequently changed his will and had apparently intractable views about who he wanted performing his legal work as well as how he wanted to dispose of his wealth. For nearly 30 years, his wills followed a predictable pattern which included the dividing of the residue of his estate among valued employees, including his lawyer. The bequests to O'Sullivan and Lynch were in keeping with his pattern.

Furthermore, at the time of the will signing, McHenry was still capably managing his own business affairs. The record reasonably supports the inference that McHenry was fully aware of the conflict inherent in having his lawyer draft a will bequeathing a substantial gift of the residue to himself and chose in the interests of privacy to disregard it.

In arguing that O'Sullivan had a duty to remind McHenry of the natural objects of his bounty, appellants erroneously assume that they, mere first cousins, qualify as the natural objects of the testator's bounty. This contest does not involve an "'"unnatural will" where dependents and those who had grown accustomed to lean upon the bounty of one are, at that death of that person, without apparent reason deprived by his will of that bounty.'" (*Estate of Sarabia* (1990) 221 Cal.App.3d 599, 608.) At the time of his death, the testator had no present spouse, and no surviving parents, brothers,

sisters, children or grandchildren.

Lynch had worked as the testator's financial and business manager for more than 15 years, during which period he accomplished cash sales of the testator's restaurants for approximately $11 million, and performed such personal tasks as caring for the affairs of his failing mother. O'Sullivan, exclusively, had handled all of the testator's legal affairs for more than 30 years. Under the circumstances, appellants were in reality no more the "natural objects" of the testator's bounty than respondents. (*Estate of Sarabia*, *supra*, 221 Cal.App.3d at p. 608; *Estate of Ventura* (1963) 217 Cal.App.2d 50, 60.)

Appellants also assert that O'Sullivan failed to carry his burden of proving the absence of undue influence, in that he purportedly admitted the failure to give the type of tax advice which any estate planning specialist should have given in connection with the drafting of the 1984 will. They make the related contention that the trial court erred as a matter of law when it disregarded as irrelevant O'Sullivan's failure to give the "usual advice" in the drawing of an estate plan merely because the lawsuit did not involve malpractice.

Appellants have cited no authority compelling a finding of undue influence in the procurement of the residuary clause merely because, in 1984, O'Sullivan did not discuss with the testator the possible tax ramifications of the $500,000 bequest of his new wife, or other provisions of his estate plan. This is not a case wherein the omitted tax advice, had it been given, was likely to result in a less generous gift, or no gift, to O'Sullivan or Lynch. (Cf. *Estate of Cleg*, *supra*, 87 Cal.App.3d at p. 599.) Indeed, the $500,000 bequest to Ruth Tullis McHenry, and newly added or increased cash bequests to Hall, Gillard and others -- which O'Sullivan included in the 1984 will without question or advice -- actually decreased the

value of the residue by more than $500,000.

Without question, O'Sullivan took "a grave risk" by drawing a will in which he received more than a modest gift in keeping with the nature of the marginally social relationship he shared with his client. (*Magee v. State Bar* (1962) 58 Cal.2d 423, 433.) His actions were ill-advised. One adverse consequence is that after many years of litigation, the instant will contest is only now drawing to a close. Nonetheless, substantial evidence supports the trial court's finding that O'Sullivan sustained his burden of proving by clear and convincing evidence that no undue influence was brought to bear in connection with the challenged residuary clause.

Appellants also challenge the sufficiency of evidence to show that the May 23, 1984 will was properly witnessed, and that the testator knew he was signing a will containing the offending residuary clause. They maintain that on that date, the testator was blind, in failing health, and completely preoccupied with divorcing his errant spouse. They argue that respondents must necessarily be lying about the lack of preconceived plan to defraud the testator and his kin, because, among other reasons: they were no longer in the testator's good graces in May 1984 and therefore were unlikely beneficiaries; several of McHenry's collateral relatives and Terry Gillard did not receive the generous bequests they were promised or led to expect; one of the witnesses inaccurately described the testator as sighted and able to walk and therefore he could not have attended the testator's will signing; and McHenry's nurse, and his personal assistant reportedly saw and heard things on May 23, 1984, inconsistent with the proper execution of a will witnessed by Holtz and Freeman.

Appellants' recitation of the "facts" amounts to nothing more than an invitation to this court to reweigh the evidence and substitute its judgment for that of the trial court.

Conflicting evidence was presented with respect to who witnessed the signing of the May 23, 1984 will, and the trial court resolved all of the conflicts against appellants. The testimony of Gillard and Huddleston, that Lynch was present on that date, was fraught with inconsistencies and was found incredible.

Substantial evidence supports the inference that the testator knew he was executing a will, not divorce documents on May 23, 1984, and that the will signing occurred in the manner described by O'Sullivan and his two former employees. Inferences are also supported that, in May 1984, the testator was functioning well from a mental standpoint; that he had sufficient vision, with the help of visual aids and use of peripheral vision, to discern what he was signing; and that he intended to leave the residue of his estate to the lawyer and financial manager who had served him for many years, and not to Gillard, Moorman, or any other of his surviving cousins. In short, appellants have given us no reason founded in the insufficiency of the evidence to disturb the lower court's judgment.

In the reply brief, appellants call our attention to several recently enacted provisions of the Probate Code which restrict donative transfers to certain "prohibited transferees," including "an attorney, conservator, or other person having a fiduciary relationship with the transferor, who drafted, transcribed, or caused to be drafted or transcribed, the instrument." (Prob. Code, § 21350, subd.(a)(1); see also Prob. Code, § 21351 added by Stats. 1993, Ch. 293 9A.B. 21), § 8.) Based on Probate Code section 21351, subdivision (d), appellants ask that we review the sufficiency of evidence without consideration of O'Sullivan's own testimony. Subdivision (d) of section 21351 provides in relevant part that for instruments executed on or before July 1, 1993, the court may determine upon clear and convincing evidence, excluding the testimony

of an attorney who drafts a testamentary instrument, that the transfer to such attorney was not the product of fraud or undue influence.

The evidentiary restriction contained in subdivision (d) of Probate Code section 21351 has no application to instruments that became irrevocable, or were executed by persons dying prior to September 1, 1993. (Prob. Code, § 21355.) Under the evidentiary rules controlling at the time of the trial, the court was allowed to consider O'Sullivan's testimony on the undue influence issue and make its findings accordingly. (*Estate of Raphael* (1953) 115 Cal.App.3d 525, 530.)

II

Appellants maintain that, because Lynch was in a confidential relationship with the decedent, and actively participated in procuring the execution of the 1984 will, he too had the burden of disproving undue influence with respect to the residuary clause. They contend that he has not met this burden.

Appellants conveniently disregard the fact that Lynch denied any knowledge of or participation in the procuring of the contested will and codicil -- or any other will for that matter -- and the trial court found no hint of participation, much less fraud or wrongdoing on his part. Since there is substantial evidence to support the trial court's finding, the presumption of undue influence was never triggered with respect to Lynch. (See *Estate of Sarabia*, *supra*, 221 Cal.App.3d at p. 605; *Estate of Fritschi* (1963) 60 Cal.2d 367, 374-376.) It is appellants who failed to sustain their burden of proving undue influence.

Appellants have suggested that, even if Lynch was not actively involved with O'Sullivan's alleged extrinsic fraud, this

court should remand the matter to the trial court for further findings with respect to the Lynch bequest. As support for this proposition, they point to dicta in a previous opinion recognizing the probate court's equitable power to decide to what extent O'Sullivan's alleged misbehavior may have influenced the gift to Lynch. (*Estate of Shelton A. McHenry*, B042160, B044490; unpub. opn. filed Nov. 20, 1991, p.26.) The trial court found no misbehavior on the part of O'Sullivan. It follows that no purpose would be served by remand to determine the effect of O'Sullivan's misbehavior on the bequest to Lynch.

III

Appellants complain that the trial court should not have allowed the introduction of "purported" copies of certain prior wills that O'Sullivan drafted for the testator and his first wife. Citing the best evidence rule, they object on the ground that the copies of the wills were unsigned, and unaccompanied by proof that the wills were ever executed, or that pages were not substituted.

Several of the copies to which appellants refer are copies of draft versions of the McHenrys' wills, offered to illustrate how the McHenrys communicated their instructions to O'Sullivan. These copies were admissible under Evidence Code section 1504. For many of the McHenrys' prior wills and codicils, O'Sullivan retained only carbon copies. The copies were identified and authenticated, and were properly admitted. (Evid. Code, § 1502.)

Two significant prior testamentary instruments were presented in their original form: the will of June 2, 1971 and the codicil of August 15, 1975. The 1971 will leaves 16.5 percent of the residue to O'Sullivan. Under the 1975 will, Lynch is left 55 percent of the residue of the testator's estate, a share greater than he received under the 1981 and 1984

wills, and O'Sullivan's share is reduced to 15 percent. The testator's generous attitude toward O'Sullivan and Lynch is manifest in these signed original documents.

Accordingly, the receipt into evidence of copies of McHenry's prior wills and codicils was not error.

IV

Appellants assert their motion for new trial should have been granted. Among other grounds, they argue that a new trial is necessary because the trial court erroneously refused to consider evidence proving that the will of May 23, 1984 was not executed in the manner prescribed by law and was obtained by fraud.

They maintain that the trial court should have allowed the testimony of co-executor Howard Marvin. Appellants made an offer of proof that Marvin would testify to "some of the tricks that O'Sullivan and Lynch pulled as a conspiracy." According to counsel for appellants, Marvin was supposed to receive a $100,000 bond according to McHenry's will and instead received twenty $5,000 bearer bonds. Marvin was also to testify that he was very close to McHenry and talked with him frequently. McHenry would have left a bequest to Terry Gillard and would have remembered that a number of personal items were to go to people other than Lynch and O'Sullivan.

Marvin could also have testified that he discussed with McHenry the fact that he ought to have a living trust, but O'Sullivan would not draw it for McHenry. Finally, a trust was drawn on McHenry in 1975. Until the day he died, McHenry was induced to believe he had a living trust. McHenry carried real estate in the name of the living trust, and carried notes and deeds of trust in the name of the living trust.

The trial court rejected the above offer of proof. Later, in announcing its decision, the court stated that Marvin's

receipt of bearer bonds was irrelevant to show a conspiracy between Lynch and O'Sullivan. The court further stated that the 1984 will made 27 specific bequests in addition to the residue, and no factual basis had been offered to prove that McHenry would have made specific additional bequests.

Regarding the claim by Marvin that O'Sullivan refused to draw up a living trust until 1975, and made McHenry believe he had a living trust, the court noted that the terms of the living trust had been place in evidence. The court found the living trust issue to be a "red herring" given that the trust, established nine years before the will, merely put the testator's property back into the estate, and disposed of it in accordance with the will. We find no fault with the trial court's ruling.[11]

Appellant did not call handwriting expert William Hatch at trial, but made an offer of proof about his proposed testimony. Hatch was to testify that the initials opposite paragraph 7 of the 1984 will were not McHenry's. No offer of proof was made concerning whose initials they purported to be.

The trial court rejected the offer of proof as unduly time-consuming and irrelevant. The ruling was not an abuse of discretion.

The seventh paragraph of the May 23, 1984 will was a handwritten entry bequeathing to Howard Marvin a bond with a face value of $100,000. Subparagraph (c) of the eighth paragraph of the same will was lined out by hand, deleting the gift of the Colonial House Restaurant to O'Sullivan. Initials

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[11]The trust agreement for the McHenry revocable trust established in August 1975 provides that on the death of the first grantor to die, the trustee shall distribute the trust estate to the surviving grantor, free of trust.

purporting to be McHenry's -- about which the expert's testimony related -- were placed next to each of the handwritten changes.

The court found the testimony of the expert irrelevant to show fraud on the part of O'Sullivan, considering that the initialed changes had the effect of decreasing the residue of the estate by $100,000 to O'Sullivan's detriment, and deleting a substantial gift of real estate to O'Sullivan. The court also refused the offer of proof on the ground that the validity of the will had already been determined by the appellate court. The trial court correctly presumed that since a finding of fraudulent initials would invalidate the integrity of the entire will, the testimony was beyond the scope of the limited issues being tried.

Appellants complain that the trial court improperly restricted Terry Gillard's testimony about McHenry's divorce, which took place during the period of the May 23, 1984 will. Other witnesses mentioned McHenry's marital problems. The dates upon which the divorce from Tullis was filed and finalized are established by the record. Accordingly, that evidence was cumulative. Its exclusion, even if error, was nonprejudicial.

Also at issue is the trial court's restriction of Gillard's examination about events on the day McHenry died. The excluded testimony was offered to show tat on the day of McHenry's death, O'Sullivan, a co-executor under the will, brought Lynch to the apartment rather than co-executor Marvin. O'Sullivan and Lynch purportedly opened McHenry's safe and took out an envelope labeled "Will" and O'Sullivan put it under his arm and returned with Lynch to his office. Later, O'Sullivan and Lynch denied the existence of any important papers in the safe, including a will.

Gillard would also have testified that Marvin was told

to come to the apartment on Wednesday following McHenry's death, at which time all of the furniture was to be removed from the apartment. O'Sullivan and Lynch removed the furniture before Marvin arrived. O'Sullivan and Lynch then divided McHenry's cars between them.[12]

The trial court correctly perceived that, considering the procedural posture of the case, appellants' pleadings and concessions in this and prior related actions, and the disposition of several prior appeals by this court, the sole issue remaining for its determination was whether the 1984 residuary clause and 1985 codicil were procured by undue influence or fraud on the part of O'Sullivan or Lynch.

Evidence showing improper execution of the 1984 will, or that Lynch and O'Sullivan destroyed or hid part or all of the testator's real will on the date of his death went beyond the limited scope of the trial. The destroyed or altered will allegation was decided against appellants nearly a year before the trial, when appellants and co-petitioner Moorman were unable to produce sufficient evidence to defeat summary judgment of their petition to probate a destroyed will.

Finally, appellants maintain that they were improperly prohibited from calling five other witnesses who were subpoenaed and prepared to testify to "important matters pertaining to decedent's relationship with both O'Sullivan and Lynch." In fact, appellants' counsel elected, on the record, not to call these witnesses because their testimony was

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[12]Lynch is still in possession of one of McHenry's vehicles. The vehicle was one of the three that were of concern to McHenry while he was alive. Lynch paid McHenry $1 for the car, took title, and paid the insurance for it. He did not take the car as a part of any plan with O'Sulivan to divide McHenry's property between them.

cumulative of testimony given by others. The trial court was not called upon to rule on the admissibility of such testimony.

Appellants also contend that a new trial should have been granted based on the "irregularity of the proceedings." The list of claimed irregularities includes: that the court failed to send the matter to Department 1 of the Los Angeles Superior Court pursuant to Probate Policy Memorandum 3:16 [sic], and improperly refused to disqualify itself upon the filing of an affidavit under Code of Civil Procedure section 170.6; that the trial court restricted the trial to only two and one-half days, reversed the order of proof, and prevented appellants from calling important out-of-state witnesses by granting a mid-trial continuance for two weeks; that the trial court excluded evidence that Lynch and O'Sullivan removed documents from the testator's safe the day of his death, and later lied about it; that the trial court was harsh on appellants' counsel and made derogatory remarks in the presence of appellants and their witnesses; that the trial court sanctioned appellants' attorney for making a motion for new trial; that the trial court allowed O'Sullivan to produce evidence of wills executed in the 1960's, and to introduce evidence which O'Sullivan had failed to produce during discovery, but would not allow appellants to produce evidence of Lynch's and O'Sullivan's conduct in the years 1985 to 1987; that the court refused to comply with Probate Code section 6124 which creates a presumption that a will was destroyed with the intent to revoke if neither the original nor a copy can be found in the testator's possession, and the testator was competent until death; and the trial court made the erroneous evidentiary rulings previously discussed.

About those alleged "irregularities" mentioned in appellants' briefs but not supported by appropriate references to the record, it suffices to say that none appear to amount to error of the sort entitling appellants to a new trial. Likewise,

we decline to reconsider claimed "irregularities," such as the trial court's evidentiary rulings, already sufficiently addressed in the context of appellants' other arguments.

Appellants make the argument that the trial court should not have considered the testator's 1981 will because the original could not be found in the possession of the testator; therefore, it was subject to the presumption that it was destroyed with the intent to revoke. (Prob. Code, § 6124.) The argument is nonsensical. The 1981 will was not admitted to probate. The 1981 will was expressly revoked by the 1984 will. Revocation of the 1981 will, whether express or presumed, did not diminish its relevance to show that in 1981, prior to suffering a heart attack and stroke, McHenry was inclined to leave the bulk of the residue of his estate to respondents.

Appellants have cited no authority for the novel proposition that the trial court's failure to transfer the matter to Department 1 entitles them to a new trial. Nothing in the superior court's Probate Policy Manual mandates that a contested matter over two days in length be transferred to Department 1. (Super. Ct. of the State of Cal. for the County of L.A. Prob. Policy Manual (1993) § 3:5:01, subd.3.) The denial of a transfer to another department was within the trial court's proper exercise of its inherent authority to supervise and control the litigation before it. (Code Civ. Proc., § 128, subd. (a)(3).)

Appellants complain that they were denied an adequate opportunity to present their case as a consequence of changes in the order of proof, unreasonable restrictions imposed on the time allowed for presentation of evidence, and the mid-trial continuance of the trial for two weeks. No abuse of judicial discretion is manifest in the record.

It was generally understood by all parties that the scope

of the issues to be tried was narrowly circumscribed by previous rulings of the trial and appellate courts. The trial court retained broad discretion to limit direct and cross-examination to avoid irrelevant, collateral, or cumulative evidence. The evidence was restricted accordingly, without apparent prejudice to appellants.

Furthermore, the record belies appellants' claim that the trial court was adamant about limiting the trial to two days. After the presentation of O'Sullivan's evidence, the trial court asked appellants' counsel how much time they thought their case would take. The judge noted that a two-day estimate had been given, but assured counsel that the court had "additional time available." Counsel for Hall asked if the court could give them "two afternoons." No response was heard from Mills's counsel.

Appellants find no fault with the trial court's determination that O'Sullivan was to carry the burden of proof on the undue influence issue. Any changes in the order of the evidence to accommodate the presumption of undue influence were well within the trial court's inherent discretion to control the proceedings. (Code Civ. Proc., § 128, subd. (a)(3).)

Appellants complained that the two-week, mid-trial continuance deprived them of three witnesses who had to return to Missouri. The record is devoid of <u>any</u> evidence to support this contention.

The transcript of proceedings on November 24, 1992, shows no objection to a continuance of several weeks. On that date, the trial court offered to resume the proceedings on December 1, but Bruce Ross, Hall's counsel, stated that he would be engaged in trial. The matter was thereafter rescheduled for December 7. On December 7 and 8, 1992, appellants called most of their witnesses. Then the matter was continued on December 23, 1992, to enable them to secure the

attendance of Rita Huddleston upon her release from the hospital. The granting of a two-week, mid-trial continuance is not cognizable as an issue on appeal.

Appellants assert that the trial court was biased against trial counsel and made derogatory remarks to him in the presence of appellants and their witnesses. Two lawyers represented appellants at trial but we presume from the record that appellants' complaint is directed to the court's conduct toward Thomas J. Jeffers, Jr., Mills's trial counsel. Appellants also make the related argument that the trial judge should have granted their motion for disqualification under the Code of Civil Procedure section 170.6. Both issues are waived by the failure to take timely and appropriate steps to preserve them. (*People v. Burnett* (1993) 12 Cal.App.4th 469, 475; *Guedalia v. Superior Court* (1989) 211 Cal.App.3d 1156, 1159-1160.)

It is contended, also that the proceedings were irregular because the trial judge allowed O'Sullivan to introduce evidence of the testator's prior wills which he had refused to produce during discovery. The allegation is unsupported. Appellants' appendix contains convincing evidence that the copies and originals of the wills and codicils of Shelton and Bernice McHenry were delivered to appellants' own questioned documents examiner on April 3, 1989, and retained for a considerable period of time.

V

Appellants and Jeffers contest the imposition of sanctions by the trial court under Code of Civil Procedure section 128.5. At the conclusion of the trial, the court ordered Hall, Mills, and Mills's counsel, Jeffers, to jointly and

severally pay $107,000 in sanctions to Lynch.[13]

In awarding sanctions, the trial court found that the action against Lynch had been "entirely, completely 120 percent without merit," and that Jeffers had acted in subjective bad faith in filing a "series of actions which were unfounded and were designed only, in the opinion of the court, to thwart the due processes of the court."

Following appellants' motion for new trial, the trial court awarded additional sanctions of $3,000, explaining that it was awarding only $3,000 in sanctions, rather than the $3,900 requested, because the filing of a motion for new trial is "almost routine." The court then commented that the reduced sanctions award was nevertheless appropriate, because counsel had "burdened [the new trial motion] up with all these grounds that are just so completely irrelevant, so completely fallacious, but to which the responding party had to address time."

Having been forced to address a multiplicity of meritless contentions in the instant appeal, this court has great empathy for the trial court and respondents. However, Code of Civil Procedure section 128.5 authorizes the imposition of sanctions to compensate a party or the party's attorney for reasonable expenses, including attorney fees, incurred as a result of the bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. The appellants' unrelenting, overzealous attack on the residuary gift to Lynch and O'Sullivan was, at times, of questionable legal merit. The mere fact that an action or tactic lacks merit, however, does not support an award of sanctions. (*Stell v. Jay Hales*

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[13]Ross did not assume representation of Hall until filing of substitution of counsel on or about November 13, 1992. Previously, Jeffers was also Hall's attorney.

Development Co. (1992) 11 Cal.App.4th 1214, 1233; *Javor v. Dellinger* (1992) 2 Cal.App.4th 1258, 1262.)

We are unable to sustain the court's determination that Jeffers prosecuted this action in bad faith. First we note that the court's finding of subjective bad faith was only as to Jeffers and did not include appellants. As to Jeffers, we believe that the lack of merit of his actions and tactics is attributable to his degree of competence and not to any proven bad faith.[14]

Appellants were heirs-at-law of McHenry and respondents were both confidants or fiduciaries who received the lion's share of a client's, or former client's multi-million dollar estate. It is undisputed that, at the time McHenry's final will and testament was drafted, he was suffering from marital problems and impaired vision, and was in a somewhat

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[14]The court appeared to have two separate views as to Jeffers, that he was either inept or that he acted in bad faith. Right before the close of evidence at the trial, the court in a frank comment to Jeffers stated "I have heard enough. You know, you don't -- I told you before, you don't have a clue as to what you are doing, you really don't."

At the hearing on Lynch's motion for sanctions, the court made the following statements: "I think you handled the case very ineptly. Well, you either handled in ineptly or in bad faith. Maybe, if you want, your choice as to what you did. I don't know. I don't think you are that inept. I think you did things, as I say, only in bad faith to try and manufacture some sort of a case. [¶] . . . [¶] Your conduct at the trial showed a complete lack of either understanding of the case or just a complete desire to obfuscate the factors in this case. [¶] . . . [¶] Your objections show absolutely no -- show no either understanding of the case or show a complete refusal to accept the facts of this case."

physically weakened condition following a heart attack and a stroke. The presence of such circumstances together with the presumption of undue influence which arises because of the relationship between respondents and McHenry belies the trial court's finding that appellants' actions and tactics while represented by Jeffers were conducted in bad faith, or solely for the purpose of unnecessary delay.

Accordingly, this is the rare case in which the injury resulting from the imposition of sanctions is sufficiently grave so as to amount to a manifest miscarriage of justice. (*Tenderloin Housing Clinic, Inc. v. Sparks* (1992) 8 Cal.App.4th 299, 304.)

The trial court's orders awarding sanctions of $107,000 and $3,000, respectively, are reversed. In all other respects, the judgment is affirmed. Respondents are to recover costs on appeal.[15]

NOT FOR PUBLICATION

_____, J.

FUKUTO

We concur:

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[15]Our disposition of this matter makes it unnecessary to address the few remaining issues raised by the parties.

_____, P.J.
BOREN

_____, J.
GATES

Date entered: May 19, 1994

Nos. B 042160, b 044490

(Super.Ct.No. P 718653)

IN THE
COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

Estate of SHELTON A. McHENRY,
Deceased.

EDWARD S. HALL, et al.,
Contestants-Appellants
v.
THOMAS E. O'SULLIVAN, et al.,
Petitioners-Respondents.

No. B 044645
(Super.Ct.No. P 718653)

BEATRICE CUNNINGHAM MOORMAN,
Appellant
v.
THOMAS E. O'SULLIVAN, et al.,
Respondents.

November 20, 1991

Shelton McHenry ("decedent") died July 14, 1987. Appellants, relatives of decedent, contested the validity of the will and codicil admitted to probate August 24, 1987. Appellant Hall's initial petition for revocation of probate was filed exactly one day after the 120-day period allowed under Probate Code section 380, now section 8270.[1]

The trial court granted summary judgments in the will contests to the two residuary beneficiaries of decedent's multimillion dollar estate, respondents Thomas O'Sullivan and John T. Lynch. O'Sullivan had been decedent's attorney for several decades and drafted the subject will; he, along with Howard K. Marvin, were named executors of the estate. Lynch had been the business manager of decedent's restaurants.

In appeal No. B042160, appellants Hall and Mills appeal from the summary judgment in favor of Lynch. In appeal No. B044063, Hall and Mills appeal from the summary judgment in favor of O'Sullivan and seek review of an earlier summary adjudication in favor of O'Sullivan as well as denial of their motion for reconsideration of the summary adjudication; appeal No. B044063 was consolidated with Appeal No. B042160. In Appeal No. B044490, Hall and Mills appeal from various orders made by the court following its rulings on the summary judgments. Finally, in appeal No. B044645, appellant Beatrice Cunningham Moorman appeals from the trial court's order denying her intervention in the will

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[1]The Probate Code has been amended since the rulings in this case; we will use the code section applicable at the time the trial court ruled. Unless otherwise indicated, all further statutory references are to the Probate Code.

contest.[2] We have been informed by counsel that there is at least one other appeal, No. B048301, by Hall and Mills from the trial court's order granting O'Sullivan's petition for extraordinary fees; that appeal is not now before us.

Because the procedural history is critical to understanding the rulings and arguments in this case, we set it forth in detail.

Procedural History

Decedent's 1984 will and 1985 codicil were filed August 3, 1987, a few weeks after decedent's July 14, 1987, death. The will, drafted by O'Sullivan and witnessed by his secretary and another employee called from his office to decedent's home, left substantial sums to decedent's wife and mother; these provisions were deleted in the codicil after his mother's death and his divorce from his second wife. Decedent left sums of mostly $5,000 to $15,000, to 27 individuals, including $5,000 to Hall and $10,000 to Moorman. He also left a handwritten provision for bonds to Howard K. Marvin and restaurants, since sold, to respondents. He left the substantial residue one-half to Lynch and one-half to O'Sullivan. The will, which contained a no contest clause, was signed by the testator only on the last page; his initials were found only by the few interlineations in the will.

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[2]This Division decided the appeal of another relative, Debra McDaniel, in an unpublished opinion filed May 24, 1990. We held that, under the law applicable at the time, the executor was under no duty to search for unknown heirs and therefore was not required to give Ms. McDaniel, the daughter of a beneficiary named in the will, actual notice of the probate proceedings. We therefore affirmed the trial court's order denying Ms. McDaniel's motion to set aside an order admitting to probate the subject will and codicil.

O'Sullivan and Marvin were appointed as executors. A minute order indicates the will and codicil were admitted to probate August 24, 1987, and an order so stating was signed by Judge Ann E. Stodden on August 26, 1987.

Appellant Edward S. Hall's petition for revocation of probate was filed December 23, 1987, 121 days from the August 24 minute order but within 120 days of the August 26 order for probate. Hall, who had received notification of the probate proceedings, was the only contestant in his initial petition. The only citation (similar to a summons) was to O'Sullivan and Lynch. The petition asked that the probate be revoked as to respondents' bequests on the grounds of unsoundness of mind and understanding, undue influence, fraud, and lack of due execution.

O'Sullivan demurred to the petition based on its not being filed within the 120 days allowed by sections 380 and 384. On February 12, 1988, the demurrer was sustained with leave to amend within 10 days.[3]

On February 19, 1988, Roy E. Dyas, another cousin of decedent (but not a party to this appeal), noticed a motion to set aside the order admitting the will go probate. He claimed the executor should have known of his relationship to decedent but did not give him notice. Appellant Mills filed a joinder with Dyas petition on March 4, 1988. At this point, the executors claimed Mills' joinder was deficient; they had no reason to know of either Dyas or Mills; and they objected Hall did not file an amended petition within the 10 days allowed by the court. The contestants claimed O'Sullivan purposely did not want to locate relatives not named in the will, arguing part of his plan was to preclude a contest by those named, who were subject to the "no contest" provision, and to discourage

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[3]Hall filed his amended petition February 26.

claims by those relatives not named by not notifying them of the proceedings. Judge Hubbell denied the motion by Dyas and Mills to set aside the order admitting the will to probate.

On March 16, 1988, Hall and Mills filed a second amended petition for revocation of probate.[4] The petition alleged the filing of the original petition was timely and, if not, time was extended by reason of O'Sullivan's fraudulent representations. Mills alleged he joined in the petition as an interpleader and as a known heir, "files the contest herein based on the time period of his joining herein to be within 30 days from the time he first had notice" of the probate. The prayer of the second amended petition asked that the will be revoked as to O'Sullivan and Lynch and that any property obtained by O'Sullivan and Lynch be held by them as constructive trustees for the heirs.

On April 7, 1988, O'Sullivan moved to strike the second amended petition, arguing the court had not given permission to amend twice. He also demurred to the second amended petition, again urging Hall's filing on the 121st day was untimely. He argued there was no extrinsic fraud that would extend the time for filing a will contest even if the allegations about his misconduct were true; that the alleged statements were not made to the contestants then before the court, and that Mills was not a "known" heir and was not even in Hall's original petition. O'Sullivan declared he told Moorman, to whom the alleged representations had been made, to seek her own legal counsel; he further declared that, even

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[4]Thereafter, Hall asked the court's leave to file the Second Amended Petition. On April 1, 1988, Judge Hubbell gave leave to file a second amended petition and to the first amended petition and O'Sullivan's demurrer thereto off calendar.

if the subject will were set aside, decedent's 1981 will similarly left the residue to O'Sullivan and Lynch.

The trial court overruled O'Sullivan's demurrer, denied his motion to strike, and gave him 30 days to answer. Lynch did not demur but instead answered the second amended petition on April 25, 1988.

On May 17, 1988, Hall filed a petition for partial distribution of the estate, a move now used by respondents to attempt to foreclose his contest. After acknowledging the will contest against O'Sullivan and Lynch, Hall requested that the court order distribution of most of the specific monetary bequest, including the $5,000 to Hall and $10,000 to Beatrice Cunningham Moorman. O'Sullivan objected to distribution of the bequest to Hall because he had contested the will and to Moorman, because she "apparently supported him by filing declarations in support of his contest." The order for partial distribution, filed July 12, 1988, stated the petition had been granted and ordered the various specific bequests, not mentioning the $5,000 to Hall. However, the record on appeal contains Hall's signed receipt on distribution as well as Moorman's cancelled check as a substitute receipt on distribution. The order was later corrected nunc pro tunc to include the distribution to Hall.[5]

In another procedural move important to the posture of the appeal, on May 27, 1988, O'Sullivan made a motion for severance and separate trial of the issue with respect to the alleged extension of time to file the contest. If the contest was

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[5]Later that summer, O'Sullivan as the executor asked that Lynch's creditor's claim against the estate for $140,000 in deferred compensation be granted. It was. O'Sullivan's law firm's creditor's claim of $21,232.75 for legal services through the date of death was also approved.

untimely and the untimeliness was not excused by his alleged extrinsic fraud, O'Sullivan urged that neither he nor the court need spend time on discovery or proof of any misdeeds alleged in procuring the will. At this time, evidence was being produced in discovery tending to show the will produced by O'Sullivan did not match the wishes of decedent, whom some said did not like either O'Sullivan or Lynch.

Judge Hubbell ordered the issue of extrinsic fraud severed and tried separately prior to trial of all other issues pertaining to the will contest; discovery as to the issues other than extrinsic fraud was stayed. Following that order, arguments regarding discovery matters escalated; a referee was eventually appointed for discovery purposes.

On February 3, 1989, Lynch filed a motion for summary judgment or, in the alternative, for summary adjudication of issues. The issues for which he sought adjudication were:

"ISSUE NO. 1: [¶] This will contest was filed one day late in violation of Probate Code Section 380.

"ISSUE NO. 2: [¶] The admission of decedent Shelton A. McHenry's ('McHenry') August 24, 1984 Will and April 20, 1985 Codicil (collectively the 'Will') to probate is conclusive as to Lynch, pursuant to Probate Code Section 384.

"ISSUE NO. 3: [¶] Lynch engaged in no conduct whatsoever which prevented the contestants, or any other interested party, from timely filing a contest of McHenry's Will.

"ISSUE NO. 4: [¶] This action is time-barred as to Lynch pursuant to Probate Code Section 380.

"ISSUE NO. 5: [¶] Lynch did not unduly influence McHenry in the execution of his Will, in that Lynch engaged

in no conduct whatsoever which relates to either the preparation or execution of McHenry's Will.

"ISSUE NO. 6: [¶] Lynch engaged in no acts of fraud in inducing McHenry to execute any will or inducing McHenry to make any testamentary disposition of his property upon his death."

Also on February 3, 1989, O'Sullivan filed a motion for summary adjudication of the following issues:

"ISSUE NO. 1: [¶] William Dean Mills ('Mills') is not a proper contestant in this action in that he failed to timely file a will contest pursuant to Probate Code Sections 370 and 380, and in that he failed to obtain leave to file and file a complaint in intervention pursuant to Code of Civil Procedure Section 387.

"ISSUE NO. 2: [¶] Even if Mills were granted leave to file a complaint in intervention pursuant to Code of Civil Procedure Section 387, such a complaint would be time-barred by Probate Code section 380.

"ISSUE NO. 3: [¶] Hall is estopped to assert the invalidity of the entire will, as Hall has validated the will by both taking and by petitioning for all other legatees and devisees to take under it (excluding the residuary legatees).

"ISSUE NO. 4: [¶] This court lacks personal jurisdiction to adjudicate property rights of those who have already taken under the will in that all heirs, legatees and devisees under the will (excluding the residuary legatees) were not issued and served with citations on the [p]etition for [r]evocation of [p]robate, as required by Probate Code Section 381.

"ISSUE NO. 5: [¶] The contestants have alleged that only the residuary clause of the will be invalidated, which

allegation is inconsistent with grounds of contest which attach the validity of the will in its entirety.

"ISSUE NO. 6: [¶] The first ground of contest (unsoundness of mind and understanding) must be dismissed.

"ISSUE NO. 7: [¶] The fourth ground of contest (lack of due execution) must be dismissed.

"ISSUE NO. 8: [¶] Even if Hall is ultimately successful in invalidating the residuary clause of McHenry's will, only that portion of McHenry's estate which Hall would otherwise take by intestate succession can be the subject of this action.

"ISSUE NO. 9: [¶] Pursuant to Probate Code Section 384, probate of the will is conclusive as to all heirs-at-law, devisees and legatees, except for Hall."

Both Lynch and O'Sullivan filed separate statements of undisputed facts and declarations in support of their motions. Further, they each joined in the other's motion. By contrast, contestants' initial opposition relied only on the contention there had been inadequate discovery, partly because of the bifurcation of proceedings. Following replies by Lynch and O'Sullivan, the contestants filed an additional reply and more points and authorities. This reply contained declarations of Moorman, Hall, and decedent's personal attendant and nurses.

Ms. Moorman's declaration detailed her experience with O'Sullivan and his apparent efforts in advising her against taking any action to contest the will. O'Sullivan allegedly sent Moorman to inform Hall and anyone else that if there were any questions to call O'Sullivan "as there was no way it could be contested." He dined with her on several occasions and called her not less than 18 times. She told him "practically every time" that she did not believe the will was correct but he assured her it was decedent's will and what decedent wanted

and that a previous will provided the same thing. She had trust and confidence in him and relied on his information. When she told him Hall did not think it was decedent's will, O'Sullivan told her to tell Hall he "did not have a chance if he contested the [w]ill because he had many witnesses to show that this was Mr. McHenry's intent, and for [her] to tell Eddie that if anyone contested it, he would lose his bequest in the [w]ill, and that it would make a judge really mad." After she and Hall consulted with their current attorney, they decided on December 23, 1987, to file the contest. Because she was in poor health and was expecting to have an operation in the near future, counsel informed them the contest would be filed by Hall "which would open the door so [she] could present [her] claim at a later date when [her] health was better." Absent O'Sullivan's representations, she asserted that a contest would have been filed earlier.

The gist of the declarations regarding the substance of the will contest was that the decedent, who had been in weak medical condition with poor eyesight, "thoroughly disliked" Lynch, resented O'Sullivan's bills, an considered him a business acquaintance and brunt of jokes, not a personal friend. Decedent had indicated other dispositions of his estate and would not have left such large sums to respondents. Terry Gillard, decedent's personal assistant since 1979, declared that immediately after decedent died, O'Sullivan contacted Gillard; since Gillard was the only person with the combination to decedent's safe, O'Sullivan "demanded that [he] open the safe for him. Mr. Lynch and Mr. O'Sullivan came to the apartment. Mr. Marvin [the other executor] was not present at this time. They took all of the important papers out of Mr. McHenry's safe and [he] noticed that they took one paper out and said, 'This is it.' [He] believed[d] that was the true will . . . ."

In additional points and authorities filed March 8, 1989,

the contestants argued O'Sullivan's declaration about decedent's signing of the will conflicted with his own secretary's deposition regarding whether decedent initialled the interlineations in the presence of the witnesses. The March 8 documents included decedent's hospital records from May 15, indicating his weak condition. O'Sullivan objected to the "additional reply" and stated he was not seeking adjudication of whether Hall was extrinsically defrauded into filing the contest late.

While the parties were filing their papers regarding the requests of Lynch and O'Sullivan for summary adjudication of summary judgment, appellant Beatrice Cunningham Moorman for the first time sought joinder with Hall in his petition for revocation of probate. She filed her joinder document on March 8, 1989.[6] Two days later, on March 10, 1989, Debra

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[6]In April 1989, Moorman filed a will contest in intervention and a declaration for order granting leave to intervene. She declared she did not file when Hall did because she was "very ill at that time and not in a position to undertake litigation." Respondents move to strike her joinder, filed one year and two months after expiration of the statutory time. On April 28, 1990, the trial court denied Moorman's attempt to intervene, finding Moorman had known for a long time about the proceedings and that she had the right to come in. The finding that Moorman's delay in filing was unreasonable is certainly supported by the record. Since the issues she raises are not new to the contest and since respondents have demonstrated no prejudice from her intervention, on remand the court should reconsider its order denying her intervention; we will reverse the denial of intervention in appeal No. B044645 to allow such reconsideration in light of the entire proceedings. (See *Estate of Harootenian* (1951) 38 Cal.2d 242, 246.)

McDaniel, whose appeal is discussed in footnote 2, supra, filed her motion to set aside the order admitting the will and codicil to probate. She was the daughter of decedent's first cousin and alleged fraud by O'Sullivan in not notifying all heirs.

Also on March 10, 1989, a hearing on the motions for summary judgment and summary adjudication was held by Judge Goldin, who apparently inherited the probate calendar from Judge Hubbell in 1989. On March 24, 1989, the court issued a minute order granting summary judgment in favor of Lynch and summary adjudication of issues one through nine in favor of O'Sullivan.

On March 31, 1989, O'Sullivan filed a motion for summary judgment. He relied on the court's order granting Lynch's summary judgment, arguing that since Lynch would take the entire residue pursuant to section 6148(b)[7] even if all allegations against O'Sullivan were true, the contestants could not be "interested persons" for the purpose of bringing a will contest and therefore the will contest should be dismissed.

Contestants filed motions for reconsideration of the March 24 orders granting summary judgment and summary adjudication. As to Lynch, counsel for contestants conceded that no one had accused Lynch of extrinsic fraud for extension of time purposes but asserted Lynch was in a conspiracy with O'Sullivan to defraud the estate and probate of the entire residuary clause as to both respondents may be revoked if the clause was affected by undue influence of fraud even if Lynch did not directly participate in any wrongdoing. In addition,

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[7]Section 6148, subdivision (b) provides in pertinent part: "If the residue . . . is devised to two or more persons and the share of a devisee fails for any reason, the share passes to the other devisees in proportion to their other interest in the residue . . . ."

contestants argued discovery had been stopped regarding the grounds for disputing the will itself, so Lynch's summary judgment should not have been granted. Contestants produced a declaration by Dr. Robert S. Helper, a professor of ophthalmology at UCLA who had examined decedent in 1984 and opined "it would be impossible for [decedent]" to read the 1984 will.

Lynch filed a declaration in opposition to contestants' motion for reconsideration. He asserted his frequent contact with decedent from the time he was hired in 1971 as general manager of decedent's restaurant operation until his amicable termination in 1987 when all of decedent's restaurants had been sold. Lynch claimed he, and not Moorman, arranged for funeral arrangements when decedent's mother died in December 1984. He disclaimed any "involvement whatsoever in the preparation or execution" of any will or codicil or any conspiracy with O'Sullivan either to prevent filing of any will contest or regarding procurement and execution of the will. Furthermore, on the date of McHenry's death, Lynch stated he met O'Sullivan at decedent's apartment; O'Sullivan's exclamation "here it is," noted by Terry Gillard, was upon finding an expensive Patek watch they were looking for; Lynch "did not see anything that even remotely resembled a [w]ill."

In response to Lynch's declaration, appellants filed several declarations. A declaration by Ruth Tullis McHenry, decedent's former wife, contradicted O'Sullivan and Lynch depositions regarding decedent's ability to read. Her declaration was supported by Dr. Gary Asano's declaration, in which the doctor of optometry who had examined decedent in 1984 to 1986, stated "it would have been impossible" for decedent to read a significant part of the 1981 or 1984 wills, as claimed by O'Sullivan.

With respect to decedent's view of his two residuary

beneficiaries, his former wife declared he "disliked John Lynch very much and he felt he had caused the downfall of his very successful restaurants. His most frequent statement was, 'I wish that I had never laid eyes on the man.'" As for O'Sullivan, decedent felt he "often took advantage of him due to the fact that he could not see, and [decedent] had to depend on O'Sullivan for his legal matters."

A declaration by Terry Gillard states O'Sullivan and Lynch arrived at decedent's apartment about 10 a.m. on the date of death. Gillard opened the safe for them; One of several envelopes of papers in the safe was labeled "IMPORTANT DOCUMENTS" and one was labeled "WILL." Gillard had seen these papers numerous times when opening the safe for the decedent to get his watch and gold cuff lings. O'Sullivan took the papers out of the safe and said, "This is it."

Contestants also filed replies to O'Sullivan's motion for summary judgment, arguing there was at least intestacy as to the residue. O'Sullivan's substantive reply centered on his argument that equity acts in personam, that there was no evidence of extrinsic fraud or conspiracy by Lynch, and therefore any extrinsic fraud by O'Sullivan cannot set aside a judgment as to the innocent Lynch, to whom the residue would go under section 6148(b). O'Sullivan concludes "Thus, even if Hall is successful in proving his allegations, "O'Sullivan's failed bequest would pass to Lynch and not by intestacy. [Hall] is no longer an 'interested person' within the meaning of Probate Code Section 380, this contest must be dismissed."

The trial court gave contestants the courtesy of a rehearing, denied the pleas for reconsideration, and on June 9, 1989, granted O'Sullivan's motion for summary judgment. The trial court observed that there was no valid will contest as to Lynch; if O'Sullivan loses, Lynch would get the entire

residue; and therefore contestants have no real contest to pursue.

On June 13, 1989, contestants filed a motion for reconsideration of the order granting Lynch's summary judgment. They also sought to vacate the summary adjudication, and to file a motion against the trial court pursuant to Code of Civil Procedure section 170.6. In addition, they filed a supplement to the second amended petition requesting enlarging the prayer to request revocation of the entire will.

On July 7, 1989, the court granted respondents' motion to strike the Code of Civil Procedure section 170.6 motion and denied contestants' motion to vacate the summary adjudication.

Numerous documents were filed in support of and opposition to these various motions. On July 12, 1989, contestants filed declarations by two medical doctors who had treated decedent; they both declared, contrary to O'Sullivan's version of the will-signing, that it would have been impossible for decedent to have read the will.

On July 24, 1989, summary judgments were entered for Lynch and for O'Sullivan. At a hearing on July 28, 1989, the court granted respondents' motions to strike the Supplement to the second amended petition filed June 13; quashed belated citations, denied the motion for reconsideration of the order granting Lynch's summary judgment, and awarded sanctions of $500 each to Lynch and O'Sullivan. The court continued O'Sullivan's motion to dismiss without prejudice contestants' petition for removal of executors and objections to the accounting. The order implementing those decisions was filed August 18, 1989, and is the basis for appeal No. B044490.

Contentions on Appeal

Respondents' basic argument is that the will contest,

filed on the 121st day, was fatally delinquent;[8] there was no extrinsic fraud by O'Sullivan allowing late filing of the contest; even if there was extrinsic fraud by O'Sullivan, it would not excuse Hall, Mills, or Moorman from their late filings; and, in any event, any extrinsic fraud by O'Sullivan has no bearing on the separate residuary bequest to the "innocent" Lynch, so the contestants have no pecuniary interest at stake and cannot contest the will. Moroever, respondents argue Hall was estopped from contesting the will in its entirety (on grounds of unsoundness of mind and understanding and lack of due execution) because under section 6100 the entire will must be revoked if one is not of sound mind and Hall, who did not serve citations on the non-residuary legatees and heirs-at-law and who had requested and accepted his $5000 bequest under the will, cannot then attack the will as a whole. Respondents berate the inadequacy and alleged unfounded hyperbole of the contestants' assertions and argue contestants cannot demonstrate the summary judgments were an abuse of the trial

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[8]As previously noted, Hall's petition for revocation of probate was filed 121 days from the August 24, 1987 minute order but within 120 days of the August 26, 1987 order for probate. Although the timeliness of filing the petition within 120 days of the August 26 formal order was raised below, appellants did not emphasize that issue on appeal. At oral argument, we asked the parties to provide further briefing on that issue. Having reviewed their briefs and the legislative history of section 380, we are convinced the Legislature intended to codify the portion of *Wolfson v. Superior Court* (1976) 60 Cal.App.3d 153, stating that the contest period starts running from the date the clerk enters the notation of admission to probate in the minute order, not from the subsequent formal order. The petition for revocation of probate in the case at bench was therefore filed one day late.

court's discretion.

Since O'Sullivan's principal arguments rely on the validity of Lynch's summary judgment, appellants first attack the rulings for Lynch. Appellants contend the stay order regarding discovery regarding the will's execution prevented them from discovering any evidence of Lynch's participation in procuring the will.[9] Furthermore, even if Lynch did not actively participate in either procuring the will or in the extrinsic fraud, appellants argue he is not entitled to summary judgment if O'Sullivan committed extrinsic fraud and the residuary clause should be set aside. Moreover, appellants argue the summary adjudication for O'Sullivan was erroneous: (1) Hall should not be estopped from challenging the will because of his petitioning for and receiving $5,000 when his petition conceded the existence of the will contest and he received a sum much less than intestacy; (2) Mills' intervention was informally granted and, in any event, he was known by the executor but not given statutory notice; and (3) Moorman should have been allowed to intervene since she provided no new grounds of contest, there had been extrinsic fraud, and she had been very ill when the initial contest by Hall was filed. Appellants emphasize the unfairness of a situation whereby an attorney can draft a will making him executor and substantial beneficiary and, even if the attorney procured the will by undue influence, can take his half of the residue if the other, "innocent" beneficiary does not seek to revoke the probate.

Discussion

This case presents a conflict in policy affecting probate

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[9]In one of his respondent's briefs, Lynch in "all fairness," agrees that the issue of whether he played any part in procuring the 1984 will "possibly touches upon matters regarding which discovery had been curtailed . . . ."

matters. On the one hand, the time limit for filing a petition for revocation of probate of a will "is jurisdictional. (See Prob. Code, § 384; *Estate of Smith* (1931) 214 Cal. 50 . . . .)" (*Wolfson v. Superior Court*, *supra*, 60 Cal.App.3d at p. 160.) "It is clear that there is a pervasive and dominant judicial and legislative theme that probate matters must be expeditiously handled to effect a prompt distribution of property to the decedent's designated beneficiaries and to avoid unnecessary delay and expense. [Citations.] In this context it is understandable why the Legislature limited the time within which will contests can be filed to relatively short periods. . . . The Legislature was undoubtedly aware that longer limitations periods heighten uncertainty over the validity of the will and result in increased expense to the parties. [¶] The date on which the will is admitted to probate serves as the bright line for the commencement of the 120-day period within which a postprobate contest can be filed." (*Estate of Horn* (1990) 219 Cal.App.3d 67, 71-72.) Thus, the "probate of a will is conclusive if not contested within 120 days after the will is admitted to probate." (*Estate of Sanders* (1985) 40 Cal.3d 607, 613.)

On the other hand, however, "[e]ven in the absence of a timely contest . . . a court may exercise its equitable jurisdiction to set aside orders and decrees of probate proceedings in cases of fraud or mistake. [Citations.]" (*Estate of Sanders*, *supra*, 40 Cal.3d at pp. 613-614; emphasis added.) The Supreme Court, in *Estate of Sanders*, *supra*, at page 614, then observed: "It is well settled, however, that 'only upon proof of extrinsic and collateral fraud can plaintiff seek and secure equitable relief from the judgment. A showing of fraud practiced in the trial of the original action will not suffice.' [Citation.]" (See also section 8007, operative July 1, 1991, which states an order admitting a will to probate, when final, is usually a "conclusive determination of the jurisdiction of the

court and cannot be collaterally attacked," but not if there is the "presence of extrinsic fraud in the procurement of the court order.") When a judgment or order has been obtained by fraud, the "'fraud is regarded as perpetrated upon the court as well as upon the injured party.' [Citation.]" (*Baker v. O'Riordan* (1984) 65 Cal. 368, 370.)

Moreover, courts are particularly vigilant where the alleged impropriety is by an attorney. Where the alleged undue influence is by the attorney who drafted the will and takes a substantial sum of the estate, "such a bequest invites invocation of the evidentiary presumption of undue influence. . . ." (*Estate of Lind* (1989) 209 Cal.App.3d 1424, 1430.) In such instances, even if the contestant cannot prove standing, when "it is plain" that the attorney "drafted the will in which he is named as executor and as a major beneficiary, the probate court may upon its own motion raise the presumption of undue influence and require [the attorney] to rebut the presumption. [Citations.} In such cases of possible abuse of the confidential relationship by attorneys, the probate court should raise the presumption sua sponte. Such exercise of undue influence by attorneys are especially egregious and thus require the closest scrutiny. [Citations.]" (Id. at pp. 1436-1437; emphasis added.)

Appellants did bring to the trial court's attention, by a petition filed only one day late, uncontested evidence that counsel for decedent drafted the will and placed himself as co-executor; called employees from his office to witness the will although decedents' employees were available; and became the beneficiary of half the substantial residue of decedent's estate. These facts alone might alert the trial court to investigate further. These concerns would have easily been before the probate court had a timely contest been filed. The question is whether the one-day delay precludes consideration of the underlying will contest.

We agree with respondents that appellants' papers were often sloppy, belated, and unduly repetitive. Each motion for reconsideration seemed to produce additional evidence that might well have been produced more expeditiously. Having read the record on appeal, we share the exasperation of respondents and the trial court with appellants' litigation procedures below.

Although we are concerned with the state of the record, in our view the record on appeal does raise a material issue of fact regarding extrinsic fraud by O'Sullivan vis-a-vis Hall. There is evidence O'Sullivan, who as executor was in a fiduciary relationship with the legatees (see *Bacon v. Bacon* (1907) 150 Cal. 477, 489), persuaded Moorman not to file a timely contest, thereby precluding her from a trial on the validity of decedent's will. (Cf. *Lazzarone v. Bank of America* (1986) 181 Cal.App.3d 581, 596-597.) Further, there is evidence O'Sullivan successfully sought to use Moorman to persuade others, including Hall, not to contest the will.

We do not think Hall's petitioning for and eventually accepting the $5000 specific bequest precludes his petition to revoke probate.[10] For example in *Bacon v. Bacon*, *supra*, 150 Cal. at page 479, plaintiff accepted $2,000 in a 1896 distribution of the estate; she instituted suit in 1899, successfully claiming the original will provided she would receive $10,000 and there had been a misreading of the provision. Hall brought the will contest to the attention of the court in seeking partial distribution, and stated the contest was as to the residuary clause and any specific bequests as to Lynch and O'Sullivan. Under the peculiar facts of the case at bench,

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[10]We have not been asked to and do not reach the issue of whether the $5,000 distribution to Hall was appropriate in light of his contesting the will.

Hall is not precluded from contesting O'Sullivan's and Lynch's methods of procuring the residuary clause and their specific bequests even if the specific bequests to Hall and others remain intact. (Cf. *Estate of Patmore* (1956) 141 Cal.App.2d 416, 420-421, where husband's election to take under the will in one state bound him elsewhere, the court stating, "One who accepts a beneficial interest under a will thereby adopts the whole will and renounces every right or claim that is inconsistent with the will. . . . he cannot hold a bequest or devise with one hand and shove it away with the other.") The alleged undue influence may have been directed at procuring the residuary clause and not necessarily the rest of the will and therefore only that part would be invalid. (See *Estate of Molera* (1972) 23 Cal.App.3d 993, 1001.)

As for any conspiracy between Lynch and O'Sullivan, the evidence before the trial court is scant. However, discovery of any involvement by Lynch in procuring the will, discovery precluded by the trial court's order severing the issues and staying discovery on all but extrinsic fraud, might tip the balance in favor of the inferences that now are mere suspicions. Therefore, the stay on discovery should be dissolved to allow full exploration of the issues. Only then can contestants adequately explore the possibility of Lynch's involvement.

Moreover, even if Lynch was not involved with O'Sullivan's alleged extrinsic fraud, the residuary clause is not necessarily conclusive where there is the "presence of extrinsic fraud in the procurement of the court order" (new section 8007, consistent with case law)., O'Sullivan repeatedly tells us that equity acts in personam and therefore the probate court, acting with its equitable powers, should not be able to touch Lynch unless he has joined in the extrinsic fraud. However, as Witkin observes, "modern statutes confer considerable in rem jurisdiction on courts of equity." (11 Witkin, Summary

of Cal. Law (9th ed. 1990), Equity, § 2, p. 680.) The probate court in its equitable role can decide to what extent O'Sullivan's misbehavior, if any, affected the bequest to Lynch. (But see *Estate of Stauffer* (1956) 142 Cal.App.2d 35, 43.)

Finally, we reject O'Sullivan's concept that, assuming Lynch can take, contestants are not "interested persons" since Lynch was entitled to the entire residue -- and since Lynch has not contested the will, the contest must be dismissed and O'Sullivan will take half the residuary estate. If O'Sullivan fraudulently procured the will, even if equity might allow Lynch to take his own half to he residue, the inequity of allowing O'Sullivan to take his half of the residue just because Lynch did not contest the will seems obvious.[11] To allow one to profit from his own misdeeds in this context would be inexcusable.

As to appeal No. B044490, respondents correctly assert that appellants have not raised the propriety of most of the August 18, 1989, order in their appellate briefs. Respondents also contend the orders are not appealable, but we need not reach that issue since appellants have abandoned any purported appeal of the August 18 order except as to the parts of the order dealing with the substance of the summary judgment motions, which were (however peripherally) addressed in appellants' briefs. We specifically affirm the award of sanctions to respondents. Although we decline to award the sanctions requested by respondents on appeal for this abandonment, we will order the parties to bear their own costs

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11 [11]We emphasize we are viewing this proceeding at the summary judgment stage and note that respondents deny any impropriety in the procurement of the will or in inducing contestants to delay in filing a contest.

on appeal even though this decision reverses the summary judgments granted to respondents.

The summary judgments for respondents in appeal No. B042160 are reversed. The matter is remanded to the probate court for further proceedings consistent with this opinion. The order in appeal No. B044490 is affirmed except as to the parts of the order dealing with the substance of the summary judgment motions. The denial of Moorman's intervention in appeal No. B044645 is reversed with directions to reconsider in light of the entire proceedings. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED

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We concur:

_____, Acting P.J.
GATES

_____, Acting J.
NOTT

Date entered: November 20, 1991

APPENDIX C

Order Granting in Part and Denying in Part Rehearing

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION TWO

Estate of SHELTON A. McHENRY,
Deceased..

EDWARD S. HALL et al.,
Contestants and Appellants,

v.

THOMAS E. O'SULLIVAN et al.,
Petitioners and Respondents.

No. B 074070 - FILED JUN 14, 1994
(Super. Ct. No. Soc 99996)

ORDER MODIFYING OPINION AND DENYING PETITIONS FOR REHEARING

THE COURT:

The opinion filed on May 19, 1994, in the above entitled matter is modified as follows;

1. On page 16 of the typed opinion, the final sentence on the page is modified to read:

After McHenry died, O'Sullivan contacted Moorman 18 to 25 times and tried to persuade her not to contest the will.

2. On page 39 of the typed opinion, the first sentence in the last full paragraph is modified to read:

Following appellants' motion for new trial, the trial court awarded additional sanctions of $3,000 to O"Sullivan, explaining that It was awarding only $3,000 in sanctions, rather than the $3,900 requested, because the filing of a motion for new trial is "almost routine."

The instant modification effects no change In judgment.

Appellants' petition for rehearing is denied.

Respondent Lynch's petition for rehearing is denied.

I would grant the petition for rehearing of respondent Lynch.

APPENDIX D:
Order of Supreme Court of California Denying Review

SECOND APPELLATE DISTRICT, DIVISION TWO,
No. B 074070, S040635

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

Estate of SHELTON A. McHENRY,
Deceased..

EDWARD S. HALL et al.,
Appellants,

v.

THOMAS E. O'SULLIVAN et al.,
Respondents.

FILED JUL 27, 1994

Petition for review DENIED.

LUCAS

Chief Justice

APPENDIX E

Order of Justice O'Connor Enlarging Time to File Petition

SUPREME COURT OF THE UNITED STATES
No. A-259

Edward S. Hall, et al.,
Petitioners

v.

Thomas E. O'Sullivan, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 24, 1994.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme
Court of the United States

Dated this 14th
day of October, 1994